Supreme Court, U.S.
FILED
JUL 11 2005
OFFICE OF THE CLERK

No. 05-74

IN THE
Supreme Court of the United States

RICARDO HINOJOSA,
PETITIONER

v.

JOSTENS INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN E. WALL, JR.
Counsel of Record
LAW OFFICES OF
JOHN E. WALL, JR.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
(214) 887-0100 *telephone*
(214) 887-0173 *facsimile*
Attorneys for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for an appellate or trial court to substitute its opinion for that of the ultimate fact-finder and conclude on its own that inconsistent and conflicting testimony by the movant-employer's representatives is not inconsistent and therefore not capable of establishing genuine issues of material fact when one witness stated she did not consider Hinojosa disabled , even though the witness did not know if a blind person was disabled and therefore an equally plausible conclusion could be drawn, i.e., that one or all of the employer's witnesses were not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the affidavit assertions are belied by the employer's affiants depositions regarding the reason for termination , thereby at least establishing the requisite suspicion of mendacity?

3. Does the Fifth Circuit's opinion in *Hinojosa* which resolves credibility issues in favor of the movant-employer (by explaining the

inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the fact finder; (2) permits the fact finder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

4. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives litigants of the ability to accurately consider the merits of liability?

5. Whether the Trial Court and the Appellate Court in a ERISA retaliation/discrimination case can characterize direct evidence of improper motive as trivial or non-probative, particularly when it is authored by the same individuals who contend that the employee was discharged for alleged inability to perform any job, notwithstanding the direct evidence of improper motive?

6. Whether a Plaintiff who brings a ERISA retaliation case and presents direct evidence of

improper motive in the summary judgment setting is entitled to a denial of the motion for summary judgment in light of this Court's rulings in *Desert Palace* and *Reeves v. Sanderson Plumbing Products, Inc.*?

7. Whether the Fifth Circuit comports with this Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case and perhaps many others, the Fifth Circuit makes credibility determinations, weighs evidence , performs functions of the fact-finder and when weighing the evidence concludes the evidence is non-existent, trivial and non-probative without any explanation and not referencing any of the evidence offered in opposition, which in this case consisted of 102 pages of evidence?

8. In the summary judgment forum are the circuit courts, which reject the non-movant's evidence required to articulate the evidence offered and the reasons for the conclusion the non-movant's evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and / circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

9. When an employer terminates an employee, who is working, after the execution of an affidavit which the employer's attorney represented was

needed to obtain authorization for medical care under an alleged ERISA plan, does the employee have no right of action under §510 simply because the employer claims there is no more benefit available under the plan?

10. Does an employee claiming he was regarded as being disabled by his employer, required in the summary judgment setting, to prove the employer did consider him substantially limited when it discharged him, even though the employee was working and the employer allegedly terminated the employee because he could not perform his job even though the employer initiated the termination and the employee wanted to continue working?

11. Is an individual claiming ADA disability discrimination required at the summary judgment stage to demonstrate how this physical impairment which substantially limits major life activity (as compared to those who are not impaired) affects his daily life, as well as his work life when he has produced evidence that his impairment limits his ability to lift, push, pull, and grasp objects. In other words, is it necessary to demonstrate how an impairment affects an otherwise qualified individual in his non work life when the limitation is of such a character and is so basic that it would clearly affect all aspects of an individual's life?

12. In this case, the Circuit court concluded that Jostens did not regard Hinojosa as having impairment. The conclusion was based on the

statement of a person not involved in the decision to discharge and who also stated she was unable to state if a quadriplegic was disabled. Jostens terminated Hinojosa's employment after drafting and having Hinojosa execute an Affidavit regarding his impairment. After execution of the Affidavit at Jostens lawyer's request, Hinojosa was terminated without any interactive discussion regarding reasonable workplace accommodation. When an employer regards an employer as "disabled" and does not engage in an interactive process regarding reasonable workplace accommodation, doesn't that as a matter of law establish a violation of the Americans with Disabilities Act?

13. In this case, Hinojosa offered evidence that immediately after he was discharged, Jostens noted in his personnel file that another ERISA benefit case was closed. Also, Jostens had represented to Hinojosa that if he would sign the Affidavit prepared by their lawyer, he would receive future medical care under the ERISA benefit plan. Nevertheless, the Fifth Circuit concluded that not only must Hinojosa prove that he was physically qualified for the position from which he was terminated but also that he was eligible for future EIBP (Employee Injury Benefit Plan) benefits, despite the false representation of Jostens lawyer. Was this error?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States

Court of Appeals for the Fifth Circuit:

Plaintiff-Appellant:
Ricardo Hinojosa

Defendant-Appellees:
Jostens, Inc.

Counsel for Plaintiff-Appellant:

John E. Wall, Jr.
Law Offices of John E. Wall, Jr.
5728 Prospect Avenue, Suite 2001
Dallas, Texas 75206-7284

Counsel for Defendant-Appellee Jostens, Inc.

William O. Ashcraft, Esq.
Ashcraft Law Firm
325 North St. Paul Street, Suite 3900
Dallas, Texas 75201

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING vi

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ix

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES 2

STATEMENT OF THE CASE 3

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT 8

CONCLUSION 29

APPENDIX

CIRCUIT COURT OPINION (04/12/05) 1a

DISTRICT COURT ORDER (01/22/04) 11a

DECLARATION OF RICARDO HINOJOSA (07/31/03) 27a

AFFIDAVIT OF RANDALL SHAFER (01/23/02) 37a

ORAL DEPOSITION OF JUDY HOWARD (11/01/02) 41a

ORAL DEPOSITION OF DAVID BAUEREIS (11/01/02) 72a

AFFIDAVIT OF RICARDO HINOJOSA (09/14/00)..... 92a

TABLE OF AUTHORITIES

CASES

ABRAMSON v. WILLIAM PATTERSON COLLEGE OF NEW JERSEY, 260 F.3D 265 (3RD CIR. 2001) 10

ANDERSON v. LIBERTY LOBBY, INC., 477 U.S. 242, (1986) iii

BLOW v. CITY OF SAN ANTONIO, 236 F.3D 293, 298 (5TH CIR. 2001) 10

BUSKIRK v. APOLLO METALS, 307 F.3D 160 (3D CIR. 2002). 19, 20

CELOTEX CORP. v. CATRETT, 477 U.S. 317, 324, 106 S.CT. 2548, 2553, 91 L.ED.2D 265 (1986) 14

CHUANG v. UNIV. OF CAL. DAVIS, 225 F.3D 1115 (9TH CIR. 2000) 10

CLARK v. RESISTOFLEX CO., 854 F.2D 762, 770 (5TH CIR. 1988) 27

COLEMAN v. KEEBLER CO., 997 F.SUPP. 1102, 1114 (N.D.ILL. 1998) 20

DEPALMA HOTEL CORP. v. THIRD PARTY ADM'RS, 2000 WL 1515178 ..... 28, 30

DESERT PALACE, INC. v. COSTA, 123 S.CT. 2148 (2003) iii

DIPOL v. NEW YORK CITY TRANSIT AUTH., 999 F.SUPP. 309, 314 (E.D.N.Y. 1998) 20

EEOC v. HORIZON/CMS HEALTHCARE CORP., 220 F.3D 1184 (10TH CIR. 2000) 10

EVANS V. CITY OF BISHOP, 238 F.3D 586, 590 (5TH CIR. 2000) 10

FIERROS V. TEXAS DEPARTMENT OF HEALTH, 274 F.3D 187 (5TH CIR. 2001) 10

GAVALIK V. CONTINENTAL CAN CO., 812 F.2D 834, 851(3D CIR.) CERT. DENIED, __U.S.__, 108 S.CT. 495, 98 L.ED.2D 492 (1987) 27

GOWESKY V. SINGING RIVER HOSP. SYS., 321 F.3D 503, 508 (5TH CIR. 2003) 18

HENDERSON V. ARDCO, INC., 247 F.3D 645 (6TH CIR. 2001) 20, 21, 25

HINES V. MASS. MUTUAL LIFE INS. CO., 43 F.3D 207, 209 (5TH CIR. 1995) 27

JOHNSON V. PARADISE VALLEY UNIFIED SCHOOL DIST., 251 F.3D 1222 (9TH CIR. 2001) 24, 25

LYTLE V. HOUSEHOLD MANUFACTURING, INC., 494 U.S. 545 (1990) iii

MCGANN V. H & H MUSCI CO., 946 F.2D 401, 405 (5TH CR. 1991) 27

MCGREGOR V. NATIONAL R.R. PASSENGER CORP., 187 F.3D 1113, 1116 (9TH CIR 1999) 25

MCINNIS V. ALAMO COMMUNITY COLLEGE DIST., 207 F.3D 276, 281 (5TH CIR. 2000) 18

MCKENZIE V. DOVALA, 242 F.3D 967 (10TH CIR. 2001) .. 25, 26

MURRELL V. OCEAN MECCA MOTEL, INC., 262 F.3D 253 (4TH CIR. 2001) 10

OLLIE V. TITAN CORP., 336 F.3D 680 (8TH CIR. 2003)..... 22, 23

PEGRAM V. HONEYWELL, INC., 361 F.3D 272, 287 (5TH CIR. 2004)..... 18

PERDUE V. BURGER KING CORP. 7 F.3D. 1251, 1255 (5TH CIR. 1993)..... 27

RATLIFF V. CITY OF GAINESVILLE, TEXAS, 256 F.3D 355 (5TH CIR. 2001)..... 10

RAY V. GLIDDEN CO., 85 F.3D 227, 229-30 (5TH CIR. 1996)..... 15, 16

REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 530 U.S. 133, 120 S.CT. 2097, 147 L.ED.2D 105 (2000)*passim*

RICHARDS V. SEARIVER MR. FIN. HOLDINGS, INC., 59 F.3D 616, 628 (S.D.TEX. 1998)..... 15

RICHARDS V. SEARIVER, 59 F.SUPP.2D 616 (S.D.TEX. 1998)..... 16, 17

RIEMER V. ILLINOIS DEPT. OF TRANSP., 148 F.3D 800 (7TH CIR. 1998)..... 22

RIVERA-RODRIGUEZ V. FRITO LAY SNACKS CARRIBEAN, 265 F.3D 15 (1ST CIR. 2001)..... 10

RUSSELL V. MCKINNEY HOSPITAL VENTURE, 235 F.3D 219, 223(5TH CIR. 2000)..... 9

SCHOEGEL V. BOSWELL, 994 F.2D 266, 271 (5TH CIR. 1993) CER. DENIED, 510 U.S. 964 (1993)..... 28

SHERROD V. AMERICAN AIRLINES, INC., 132 F.3D 1112, 1121 (5TH CIR. 1998)..... 18

SIZEMORE V. CONSOLIDATED RAIL CORP., 56 FED.APPX. 582 (3D CIR. 2003) 17

ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502, 517, 113 S.CT. 2742, 125 L.ED.2D 407 (1993) 10, 11

SUTTON V. UNITED AIRLINES, INC., 527 U.S. 471, 489 (1999) 17

TAYLOR V. PATHMARK STORES, INC., 177 F.3D 180 (3D CIR. 1999) 19, 20

WALDRIP V. GENERAL ELEC. CO., 325 F.3D 652, 657 (5TH CIR. 2003) 18

WEST V. BUTLER, 621 F.2D 240, 245 (6TH CIR. 1980) 26

WILLIAMS V. TOYOTA MFG., 224 F.3D 840, 844 (6TH CIR. 2000), REV'D TOYOTA MFG. CO. V. WILLIAMS, 534 U.S. 184 (2002) 21

MISCELLANEOUS

29 C.F.R. § 1630.2(j) 20

29 C.F.R. § 1630.2(l) 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

29 U.S.C. § 1140 ..... 3, 26

29 U.S.C. §1002 (21)(A) (West 2000) 28

42 U.S.C. § 12102(2) 17

Federal Rule of Civil Procedure 56 2

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent. The Fifth Circuit's April 12, 2005 opinion is printed here as App.1a-10a. . The District Court's January 22, 2004 memorandum opinion and order are printed here as App.11a-26a. The Declaration of Ricardo Hinojosa filed in response to the motion for summary judgment is printed here as App. 27a-36a. The Affidavit of Randall Shafer regarding the unethical circumstances of the execution of Hinojosa's affidavit which was prepared one day before Hinojosa's termination by Josten's lawyer is printed here as App. 37a-40a. The deposition excerpts of Judy Howard HR Coordinator (who could not state if she regarded Hinojosa as disabled) contrary to the Fifth Circuit's conclusion in App 5a. The deposition of Dave Bauereis, plant manager, is printed here as App. 72a-91a. The affidavit that was obtained under false pretenses, which preceded Hinojosa's termination by one day, is printed here as App 92a-94a.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on April 12, 2005.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

1. The rules applicable to this case are as follows:

Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

. . . .

(c) Motion and Proceedings Thereon. . . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as

otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

2. The statues applicable to this case are as follows:

Employment Discrimination under 29 U.S.C. § 1140

Section 1140 of ERISA makes it "unlawful for any person to discharge, . . . expel, or discriminate against a participant . . . for exercising any right . . . . . or for the purpose of interfering with the attainment of any right to which such a participant may become entitled under the plan. . ."

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

On January 25, 2002, Hinojosa filed his First Amended Complaint including a claim of discrimination under the ADA and ERISA, alleging that his disability and employee benefits were motivating factors in Jostens' decision to terminate his employment and/or otherwise discriminate against him. On February 25, 2002, Jostens removed this case to the U.S. District Court for the Northern District of Texas-Dallas Division.

In a Final Judgment signed on January 22, 2004, the trial court granted Jostens' Motion for Summary Judgment and ordered that Hinojosa take nothing from his claims against Jostens. The Fifth Circuit after hearing oral argument on March 8, 2005 affirmed the trial court in an opinion dated April 12, 2005.

Facts Material to Consideration of the Questions Presented:

Ricardo Hinojosa was employed by Jostens, Inc.,

from approximately September 23, 1985 until his termination on September 15, 2000. Hinojosa was injured during the course and scope of his employment on or about April 2, 1997. Hinojosa was working as a Diamond setter at the Josten's facility in Denton, Texas at the time and he felt pain in his right arm while removing a stone from a ring. Hinojosa reported the injury to Jostens, but was denied treatment. That is, he requested medical care but was not sent to a doctor. Hinojosa was later transferred to a supervisor position at the Jostens Plant in Laredo which did not require the use of his arms.

In approximately March 1999, Hinojosa was transferred back to the Jostens Plant in Denton, Texas and was placed in a position as a diamond setter. The pain, restriction of motion, muscle shrinking and muscle spasms in his arm became worse when he resumed this job. Hinojosa went to the doctor for treatment ostensibly under the Jostens EBIP which by Josten's argument would have expired in April 1998. Nevertheless, Hinojosa was restricted from work by Dr. Kristoferson on or about March 22, 1999 to undergo several medical tests, including a bone scan, MRI, and to consult with a neurologist. Hinojosa underwent a Nerve Conduction and EMG study performed by a neurologist, Dr. Ravindran on or about April 22, 1999. After the EMG, Hinojosa was released to return to work with Dr. Ravindran's restrictions of no work requiring repetitive movement his right upper extremity or hands.

Hinojosa returned to work on or about May 3, 1999 with the restrictions of no repetitive right arm or hand movement. When he returned to work, contrary to his medical restrictions, Hinojosa's then supervisor, Mr. Watts, placed Hinojosa in the Coating Center

performing work that required repetitive continual movement of Hinojosa's right hand and arm. This job required Hinojosa to place approximately 100-200 rings an hour on a rack while reaching above.

Hinojosa, who is right-handed, performed this job for approximately a week during which time his arm and hand pain became much worse. After that week, Hinojosa's arm was so much worse that he could not raise it, could not reach behind himself, could not reach over head and even had difficulty brushing his teeth. Hinojosa returned to the doctor and was then again removed from work indefinitely due to this injury. Hinojosa was away from work because of his injuries from approximately May 11, 1999 until September 11, 2000. During that time, he underwent a radial tunnel release surgery on his right arm in January 2000. Hinojosa was also prescribed physical therapy in June 2000, but Jostens denied approval. In August 2000, Hinojosa was given an injection for pain in his shoulder and again prescribed physical therapy.

On September 6, 2000, two days before his first therapy appointment, Judy Howard, with Employee Insurance Benefits Program ("EIBP") for Jostens, informed Hinojosa that she had cancelled his therapy session and was going to speak with his then treating physician, (Dr. Finnegan). On September 7, 2000, Hinojosa was released to return to work by Dr. Finnegan at Howard's request for 4 hours a day beginning September 11, 2000. Judy Howard called Hinojosa on September 8, 2000 and scheduled him to work on September 11, 2000 from 8 a.m. to 12 p.m. Hinojosa reported to work as instructed by Howard. Judy Gonzales, Hinojosa's supervisor that he was working for at the time in the Lay Out department, stated he was doing a good job and that she was happy

to have someone who knew how to do the job working for her.

On September 13, 2000, Howard sent Hinojosa home stating that Jostens was worried that he was going to hurt his shoulder. Hinojosa told her that he wanted to keep working, but she insisted that he go home.

On September 14, 2000 returned to work and at approximately 8:30 a.m., Howard called Hinojosa into her office. Howard took Hinojosa to a conference room and introduced him to a gentleman that identified himself only as an employee from the Benefits Department for Jostens. The man told Hinojosa that he came to see how he could "help" Hinojosa. Hinojosa told him that he wanted to get a shoulder arthroscopy because he still had pain in his shoulder. (This had been recommended by his physician.) The man asked Howard and Hinojosa if they knew how much that would cost, but neither knew. The man told Hinojosa that he was going to have a meeting with management later in the afternoon and that he would ask if they would authorize the arthroscopy. Hinojosa told the man that if Hinojosa could get his medical bills paid, his doctor had told him that he would refer Hinojosa to a neurologist. The man then asked if Hinojosa was sure that the machine that he used at Jostens for diamond setting was what caused Hinojosa's pain. Hinojosa responded that he was not sure and that the man would have to speak to an expert on machinery. The man then told Hinojosa that Jostens knew that the machine was causing pain to many diamond setters. The man then asked Hinojosa to wait in the cafeteria while he typed up what they had discussed. Hinojosa asked if he could return to work while waiting, but the man said no and told Hinojosa to wait in the cafeteria.

The same man later called Hinojosa back to the conference room and asked Hinojosa to sign some papers. While reading the papers, Hinojosa noticed that the paper stated that Hinojosa said he did not need any medical treatment provided by Jostens EIBP. Hinojosa told the man that he did not say that and Hinojosa scratched it out. The man then said that Hinojosa had to sign the paper in order for him to present it to the directors of Jostens. The man said that without Hinojosa's signature, he could not help Hinojosa get medical care and could not get Hinojosa's outstanding medical bills paid. Hinojosa did not understand what an affidavit was. Hinojosa asked the man if the affidavit was legal document, and the man said "No" it was just a paper that he needed Hinojosa to sign so that the man could to present it to Jostens management to get Hinojosa's benefits paid. Hinojosa then signed the paper and Judy Howard notarized it. Hinojosa asked the man why the paper had to be notarized and he said it was the only way to prove that Hinojosa signed it. After Hinojosa signed the paper, the man told Hinojosa to return the next day at 7 a.m. so that he could help Hinojosa out and let Hinojosa know what Jostens had decided. Hinojosa asked if he could return to work, but the man said not until after the meeting the following day.

On September 15, 2000, Hinojosa returned to work and waited until approximately 9 a.m., before Terry Jones, a representative from Human Resources at Jostens, called Hinojosa into a conference room. Hinojosa noticed that the man who he had been speaking with the day before, and who had represented that he would help Hinojosa was present at the meeting but seemed to avoid Hinojosa. Jones told Hinojosa that Hinojosa had used all the time allowed by Jostens

EIBP to be paid while not at work. Jones told Hinojosa that the limit was 27 months and that he had been paid for 44 months. Jones said this was the time she calculated and that she was starting from the first time Hinojosa had pain. Jones said Hinojosa would be denied benefits from that time forward. Hinojosa was then offered a deal in which Hinojosa would sign a letter of resignation stating that because of his medical condition, he would not be able to perform any job offered by Jostens. In return, Jostens would try and help Hinojosa get unemployment benefits, as well as a letter from Dr. Finnegan stating Hinojosa could work a light duty job as long as it was outside of Jostens. In addition, Hinojosa was offered $2500.00 not to speak to anyone about his situation at Jostens or the deal would be terminated. Hinojosa refused this deal and was then told he was terminated by Jones. Hinojosa was told to return his work badge, was escorted out by a security guard and told never to return to Jostens' property.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit's opinion so confounds the burdens in a summary judgment setting involving alleged employment discrimination that the significance of *stare decisis* vanishes. The opinion ignores this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) regarding the quantum of proof required in an employment discrimination case. The opinion further contorts Fed. R. Civ. P. 56 to the point that all of the evidence is considered in the light most

favorable to the movant and credibility questions are unilaterally resolved in the movant's favor without considering the possibility that it was mendacity or was probative of the suspicion of mendacity. The trial court and Fifth Circuit also failed to consider direct evidence in the 102 page summary judgment appendix that would ostensibly refute summary judgment, concluding all the evidence was insufficient to raise an issue of fact. Such deviation from the accepted and usual course of proceedings under Fed. R. Civ. P. 56 and the rules of law mandated by this Court, as well as Fifth Circuit precedent, leaves uncertain the role of the trial court, the viability of *Reeves*, the burden of the non-movant in a summary judgment proceeding in an employment discrimination case and a litigant's ability to properly evaluate the unlawful conduct of the employer; therefore, review by this Court is warranted.

The Fifth Circuit's opinion in *Hinojosa* is in direct contrast to this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The *Hinojosa* opinion further conflicts with Fifth Circuit precedent, as well as decisions from other circuit courts, including the First, Third, Fourth, Ninth and Tenth Circuits, which ostensibly follow *Reeves* on the quantum of proof required in a summary judgment proceeding involving an employment discrimination case. *See e.g., Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223(5th Cir. 2000); *Evans v. City of Bishop*, 238 F.3d 586, 590 (5th

Cir. 2000); *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001); *Ratliff v. City of Gainesville, Texas*, 256 F.3d 355 (5th Cir. 2001); *Fierros v. Texas Department of Health*, 274 F.3d 187 (5th Cir. 2001); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115 (9th Cir. 2000); *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253 (4th Cir. 2001); *Rivera-Rodriguez v. Frito Lay Snacks Carribean*, 265 F.3d 15 (1st Cir. 2001); and *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265 (3rd Cir. 2001).

As followed by other circuit's, and as this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* at 530 U.S. at 148, 120 S.Ct. at 2109. This Court previously reasoned that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional discrimination." *Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Further, "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*." (emphasis in original) *St. Mary's*, 509 U.S. at 511, 113 S.Ct. at 2747-50; *see also Reeves*, 530 U.S. at 147, 120 S.Ct. at 2108. This Court made it clear that proof of the falsity of the employer's stated reason for the adverse employment action is a form of circumstantial evidence that is probative of intentional discrimination. *Reeves*,

530 U.S. at 147; 120 S.Ct. at 2108, *citing St. Mary's*, 509 U.S. at 517, 113 S.Ct. 2742.

In reiterating the *St. Mary* standard, this Court in *Reeves* recognized that there may be some instances where no rational fact-finder could conclude that discrimination occurred even when a *prima facie* case has been established and there is sufficient evidence to reject the stated explanation. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. For instance: (1) if the record revealed as a matter of law some nondiscriminatory reason for the decision; or (2) if the employee created only a weak issue of fact as to the falsity of the employer's explanation and there was "abundant and uncontroverted independent evidence" that no discrimination occurred. *Id.*

Such inadequacies were not present in *Hinojosa*. Nonetheless, in contrast to clear precedent, the Fifth Circuit affirmed summary judgment, rejecting Hinojosa's disability discrimination and ERISA retaliation claims in favor of the employer's story, ignoring Hinojosa's evidence of the falsity of the stated reason for termination and resolving the obvious credibility questions in favor of the movant-employer. The trial court and Fifth Circuit also departed from *Reeves* by giving credence to the testimony offered by Jostens from interested witnesses that was contradictory and impeached contrary to *Reeves* requirement to the contrary. *Id at* 2110.

Jostens's testimony conflicted about most every stage of the termination process, including the stated reason. The evidence of the falsity of the stated reason and Jostens's lack of credibility clearly should have precluded summary judgment. Instead, the Fifth Circuit resolved the credibility issues in favor of Jostens, somehow finding it appropriate to conclude

that the inconsistencies did not exist. For instance, the person who the Fifth Circuit stated did not regard Hinojosa as disabled (App 5a), stated in her deposition she could not answer the question. (App58a). Howard further stated she was unable to state whether she considered a person with paraplegia or quadriplegia as being disabled. (App59a) The license taken with the facts is troubling at best. Moreover Howard was not involved in the decision to terminate Hinojosa. Hinojosa would suggest the 102 page appendix which was offered in evidence and not described by either court below was sufficient ot establish material issues of fact. Some of Jostens's credibility problems regarding material issues in this case included:

- ✓ Side by side, there are sharply different accounts of what transpired. The decision to terminate was made by Dave Bauereis. He claimed it was because Hinojosa experienced pain. He did not know if employees were required to work pain free. He never spoke to Hinojosa regarding whether he could do the job despite the reports of pain.
- ✓ In addition to the fact that Hinojosa was fired one day after the interview with lawyer Ashcraft, evidence of Discrimination is also found in the alleged reasons for Hinojosa's termination. The day of termination, the employer emailed one another speaking to the closing of another employee injury benefit claim. Such is direct evidence of §510 discrimination.
- ✓ The affidavit Hinojosa signed the day before he was terminated was prepared by the employer who had sought to return Hinojosa to work. The affidavit is some evidence the

employer regarded Hinojosa as disabled.

- ✓ Hinojosa never stated he could not do the assigned job. He wanted to work. Josten's fired him for the pain he suffered, not because he could not do the job.
- ✓ There was another position of trainer that was never offered to Hinojosa.

The above examples constitute powerful evidence that the stated reason for termination was false and discriminatory because Jostens's representatives exhibited a complete lack of veracity on the issues most material to this case, i.e., why Hinojosa was allegedly terminated, how and who made the decision.

Upon review of the summary judgment evidence, this case involved a credibility question between Hinojosa and Jostens, and required a sorting of the inconsistencies between each of Jostens's representatives. The outcome of each claim should have depended on which witnesses the jury believed, as opposed to the court. The impropriety of the Fifth Circuit's effort at credibility assessment is not the grist for the summary judgment mill.

Had the Fifth Circuit abided by *Reeves*, the issue of whether Hinojosa suffered discrimination would have been properly left for the jury to resolve. Instead, after resolving the disputed fact issues in favor of Jostens and rejecting Hinojosa's affidavit testimony, the Fifth Circuit in affirming summary judgment, eviscerated *Reeves* and crafted a new and heightened summary judgment burden for non-movant-employees in a discrimination case.

The *Hinojosa* standard directly conflicts with *Reeves*. A reading of *Hinojosa* demonstrates the denigration of *Reeves* and obscures what is the

sufficiency of proof required by an employee-non-movant to survive a Rule 56 summary judgment motion. In short, the fundamental purpose of *stare decisis* serves to define the parameters of when one can expect to survive summary disposition when they cannot. Under *Hinojosa*, the concept has metamorphasized into a moving target.

2. The Fifth Circuit has issued an opinion which improperly applies the Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). The courts below merely concluded the evidence was not present, did not demonstrate pretext or essentially carried no weight. This departure from accepted and usual course of proceedings using Fed. R. Civ. P. 56 warrants review by this Court.

In addition to chiseling away at the essence of *Reeves*, the *Hinojosa* opinion machinates the Court's opinion in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

In *Celotex*, this Court explained that a non-movant in a summary judgment proceeding, who bears the burden of proof on the issues in question, may not rely on unsupported claims or defenses in the pleadings, but in responding to a motion for summary judgment is required "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex* 477 U.S. at 323-324, 106 S.Ct. at 2553, *quoting* Fed. R. Civ. P. 56(e).

As such, in an employment discrimination case,

the affidavit testimony of the non-movant-employee which sets forth specific facts showing a genuine issue for trial suffices to defeat summary judgment, particularly an affidavit such as Hinojosa's which specified that, Hinojosa was fired one day after he was duped into signing an affidavit which was to benefit him rather than be used to terminate and defend an ADA and ERISA case.

In its opinion, the Fifth Circuit holds that "the fact that Jostens terminated Hinojosa *because he could not perform the duties of any job available at Jostens* does not establish that Jostens regarded Hinojosa as substantially limited in a major life activity." App. 5a-6a. (emphasis added). This is not only a shockingly overbroad and incorrect statement of the law, but it (1) is not supported by the cases on which the Court relies, (2) appears to conflict with prior holdings of the Fifth Circuit and (3) conflicts with opinions out of the Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits.

A. The Cases on Which the *Hinojosa* Court Relies

In support of its holding on this issue, the Court cites two cases: *Ray v. Glidden Co.*, 85 F.3d 227, 229-30 (5th Cir. 1996) and *Richards v. Seariver Mr. Fin. Holdings, Inc.*, 59 F.3d 616, 628 (S.D.Tex. 1998).

1. *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996)

First, the Court in *Ray* did not address a situation in which, as here, the company clearly regarded the plaintiff as unable to perform the function of *any* job at the company.[1] Instead, the plaintiff based

[1] In this case, Jostens offered Hinojosa a Release. In that Release, Jostens attempted to have Hinojosa attest that, as a result of his injury, he was unable to perform any job at Jostens.

his argument solely on the fact that the defendant terminated him from his position as a lift truck operator. The Fifth Circuit ultimately affirmed the district court's grant of summary judgment on the plaintiff's claim that he was disabled under the "regarded as" prong of the ADA. The Court explained its holding as follows:

> "Glidden presented evidence that it terminated Ray's employment solely because his medical condition prevented him from returning to work as an LTO. *Ray neither suggests he was denied another job because of a belief that his condition would prevent him from performing adequately nor counters Glidden's evidence that no other jobs were available when his employment was terminated.*" 85 F.3d at 229-30 (emphasis added).

As there were at least three (3) other positions available at Jostens when Hinojosa was terminated and because Jostens attempted to have Hinojosa sign a document indicating he was unable to work in any job at Jostens, this case is inapposite.

2. *Richards v. Seariver*, 59 F.Supp.2d 616 (S.D.Tex. 1998)

The *Richards* case is inapplicable for a similar reason. In that case, the district court, granting summary judgment, held that evidence that the defendant's Human Resources department issued a report stating that the plaintiff could not "perform other jobs or fill shore-side positions due to his medical restrictions" was insufficient to prove that the defendant regarded the plaintiff substantially limited in a major life activity. *Richards*, 59 F.Supp.2d at 628. Thus, unlike here, in *Richards*, there was no evidence that the defendant regarded the plaintiff as being

unable to perform *any other job*. Further, it is not clear which major life activity (and specifically, whether it was that of working) the plaintiff claimed the defendant regarded him as substantially limited in his ability to perform. *Id.*

Thus, in neither *Ray* nor *Richards* does the court address the issue here: whether, if an employer discharges a plaintiff while making statements indicating it believes the plaintiff can perform no job at the defendant employer, even though there are other positions available of which the plaintiff can perform the essential functions, that employer "regards" the plaintiff as substantially limited in a major life activity under the ADA.[2]

B. Contrary Fifth Circuit Authority

In its opinion, the *Hinojosa* Court stated the "regarded as" test under 42 U.S.C. § 12102(2) as follows:

> "Jostens would be deemed to have regarded Hinojosa as disabled if it: (1) mistakenly believed that Hinojosa had a physical impairment that substantially limited a major life activity; or (2) mistakenly believed that an actual, nonlimiting impairment limited one of Hinojosa's major life activities." *Slip op.* at 6, *citing Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489 (1999) *and*

---

[2] Note that the major life activity at issue here does not have to be working. It could be any major life activity that the job requires to fulfill its essential functions (e.g., lifting, climbing, etc.). *See, e.g., Sizemore v. Consolidated Rail Corp.*, 56 Fed.Appx. 582 (3d Cir. 2003). Of course, the major life activity *could* be working given that the employer regards the employee as unable to perform any job it offers and thus unable to perform a broad range or class of jobs.

McInnis v. Alamo Community College Dist., 207 F.3d 276, 281 (5th Cir. 2000).

Although the Court cites *McInnis*, it seems to state the rule of that case incorrectly. In *McInnis* (which post-dates and discusses *Sutton v. United Airlines*) and in subsequent opinions,[3] the Fifth Circuit has articulated the "regarded as" plaintiff's burden as follows:

> "In order to be 'regarded as' disabled a plaintiff must: (1) have a physical or mental impairment that does not substantially limit major life activities, but be treated as such by an employer; (2) have a physical or mental impairment that substantially limits one or more major life activities, but only because of the attitudes of others toward the impairment; or (3) have no actual impairment at all, but be treated by an employer as having a substantially limiting impairment." *McInnis*, 207 F.3d at 281, *citing Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (5th Cir. 1998).

Had the Court correctly applied *McInnis*, it would had to have concluded that Hinojosa has "a physical impairment that does not substantially limit major life activities, but [that he was] treated as such by" Jostens, or that Hinojosa has "a physical or mental impairment that substantially limits one or more major life activities, but only because of the attitudes of [Jostens] toward the impairment..." *Id.* After all, while

---

[3] *E.g., Waldrip v. General Elec. Co.*, 325 F.3d 652, 657 (5th Cir. 2003)(same as *McInnis*) *and Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 508 (5th Cir. 2003)(same); *see also* 29 C.F.R. § 1630.2(l). *But see Pegram v. Honeywell, Inc.*, 361 F.3d 272, 287 (5th Cir. 2004)(same as *Hinojosa*).

Hinojosa did not agree, Jostens stated, in writing, that it considered Hinojosa unable to perform the essential functions of any job at Jostens, when he was indisputably able to perform the job of lay-out clerk and was never given the opportunity to show what he could do in the trainer position, or the other two (2) positions that were available.

By applying the wrong legal standard, however, the Court failed to reach this conclusion and, in so doing, perpetuated a split on this question within the Fifth Circuit, and extended a split with other Circuits.

C. The Court's Opinion Conflicts With the Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits on This Issue

1. The Third Circuit: *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180 (3d Cir. 1999) *and Buskirk v. Apollo Metals*, 307 F.3d 160 (3d Cir. 2002)

The Third Circuit has faced this issue on at least two occasions. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 188 (3d Cir. 1999) *and Buskirk v. Apollo Metals*, 307 F.3d 160, 166-67 (3d Cir. 2002).

In *Taylor v. Pathmark Stores, Inc.*, the plaintiff claimed the defendant employer regarded him as disabled "based on a mistaken interpretation of his medical records" regarding an ankle injury. *Taylor*, 177 F.3d at 188. As a result of this mistaken interpretation, the defendant wrote the plaintiff a letter stating that it understood that his ankle injury was "permanent" and that it believed he was incapable of performing "'the essential functions of any other available position, all of which require extended standing and/or walking and regular reaching.'" *Id.* at

184. The court noted that the letter "suggests a perception of limits that would likely constitute a substantial limitation on many major life activities." *Id.* at 188. As a result, it properly concluded, as a matter of fact that "[t]his is not a case where [the defendant] stated that he was unable to perform a particular job; it appears to have considered him incapable of performing a wide range of jobs..." *Id.* Accordingly, the *Taylor* court, reversing summary judgment, held, as a matter of law, that "in general, an employer's perception that an employee cannot perform a wide range of jobs suffices to make out a 'regarded as' claim." *Id.*, *citing Dipol v. New York City Transit Auth.*, 999 F.Supp. 309, 314 (E.D.N.Y. 1998); *Coleman v. Keebler Co.*, 997 F.Supp. 1102, 1114 (N.D.Ill. 1998); 29 C.F.R. § 1630.2(j).

In *Buskirk v. Apollo Metals*, the court explained, as follows, the defendant employer's refusal to consider the plaintiff for any other positions:

> "[t]he company was familiar with Buskirk's injury and medical treatment and that it surmised that he was unable to perform any work. Several vacancies in positions other than a box maker became available after Buskirk's release from work and Apollo Metals concluded that Buskirk was unable to work in any of those positions." *Buskirk*, 307 F.3d at 167.

Based on this factual premise, the court concluded that "[t]hese perceptions support Buskirk's contention that Apollo Metals regarded him as disabled." *Id.*

2. The Sixth Circuit: *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001)

In *Henderson v. Ardco, Inc.*, 247 F.3d 645, 654 (6th Cir. 2001), the employer maintained a rule

whereby, following an injury, an employee had to have been "100% healed" to return to work. *Id.* at 647. The plaintiff, a welder, suffered a back injury. *Id.* Her doctor released her to return to work with lifting restrictions. *Id.* Upon applying the "100% healed" rule, however, the employer forbade her from returning to work. *Id.* at 647-48. While she did not apply for a specific job, the plaintiff asked the company if she could return to work in any of the company's light duty positions. *Id.* The company declined her request. *Id.* The plant manager suggested that the reason for its decision to decline the request is that "'there is not a job in the plant that her restrictions would not bump into.'" *Id.* at 651.

The court concluded that "Plaintiff has brought forward evidence that the defendant perceived there was no job for her at the Ardco plant, and this gives an indication of the employer's perception about her suitability for a class of relevantly similar employment." *Id.* at 654. Accordingly, the court reversed summary judgment and remanded the case. *Id.* at 655.[4]

---

[4] Note that a segment of the *Henderson* court's analysis was based on *Williams v. Toyota Mfg.*, 224 F.3d 840, 844 (6th Cir. 2000), *rev'd Toyota Mfg. Co. v. Williams*, 534 U.S. 184 (2002). This should not change the conclusion, however, that the Sixth Circuit still regards "100% healed" rules, or other of an employer's actions in excluding the plaintiff for consideration from *any* job, as violative of the ADA. The *Henderson* court relied on the Sixth Circuit's opinion in *Williams* primarily, if not solely, for the proposition that, because the Ardco defendant's "100% healed" rule appears to have foreclosed the plaintiff from other manufacturing jobs, that was enough, under *Williams*, to rise to the level of a substantial impairment of the major life activity of working. *Henderson*, 247 F.3d at 651-52. However, the Supreme Court's holding in *Williams* was simply that the Sixth Circuit had applied the wrong framework in assessing the plaintiff's disability

3. The Seventh Circuit: *Riemer v. Illinois Dept. of Transp.*, 148 F.3d 800 (7th Cir. 1998)

This Seventh Circuit case is slightly less apropos, but instructive nonetheless. In *Riemer v. Illinois Dept. of Transp.*, 148 F.3d 800, 806-07 (7th Cir. 1998), the Seventh Circuit affirmed a judgment on a jury verdict for the plaintiff. In so doing, the court held that the employer's decision to transfer the plaintiff to a less desirable position, and that it made that decision against the determination of the plaintiff's treating physician, was evidence that the defendant regarded him as disabled. Accordingly, the court concluded that this, along with other evidence in the record, was sufficient to affirm judgment for the plaintiff. *Id.*; *see also Id.*, 806-07, n. 8.

4. The Eighth Circuit: *Ollie v. Titan Corp.*, 336 F.3d 680 (8th Cir. 2003)

In *Ollie v. Titan Corp.*, 336 F.3d 680 (8th Cir. 2003), the defendant employer refused to employ the plaintiff, who suffered from asthma. *Id.* at 683. The

---

because it looked only at a narrow range of manual tasks the plaintiff could not perform and failed to explain their central importance to people's daily lives. *Williams*, 534 U.S. at 198-99. Thus, the major life activity before the Supreme Court in *Williams* was that of "performing manual tasks," not working. Further, the *Henderson* court's language about the "100% healed" rule is somewhat deceptively understated. As it held, an employer who will not consider for employment in any position anyone who has a disability certainly perceives, rightly or wrongly, that person is unable to perform a range and class of jobs. Thus, the fact that the *Henderson* court relied on its opinion in *Williams*, and the latter was ultimately overturned, has little if any bearing on the rule the *Henderson* court articulates.

plaintiff suffered from asthma, which, the defendant maintained, caused him to be unable to work in dust and fumes. *Id.* at 683-84. For that determination the defendant relied on the company doctor from plaintiff's previous employer. *Id.* Because the employer's entire plant had dust and fumes, the defendant refused to employ him. *Id.* at 684. In upholding the district court's judgment on a jury verdict in the plaintiff's favor, the court upheld the district court's determination that "the evidence [showed] that Titan Tire believed that Ollie could not perform any manufacturing or warehouse facility job in the Des Moines area, because of its view that all such facilities would present an environment of dust and fumes." *Id.* at 686.

Further, in rejecting the employer's argument that it should be absolved of liability because it relied on a doctor's advice, the court noted, significantly, that, instead of relying on that medical opinion, it

> "relied on its own interpretation of the doctor's advice *and its own opinion that Ollie could not perform all essential functions of any available job.* It did not see Ollie as precluded from performing only one type of job because of his restrictions, but rather *concluded that he was precluded from performing any job which would put him in contact with dust or fumes*...After examining the record, we find that there was sufficient evidence for the jury to find that Titan Tire perceived Ollie as disabled within the meaning of the ADA." *Id.*, 687-87 (emphasis added).

5. The Ninth Circuit: *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222 (9th Cir. 2001)

In *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222 (9th Cir. 2001), the plaintiff, a school district grounds keeper, suffered a debilitating on-the-job injury. *Id.* at 1223. Approximately six (6) month later, the plaintiff received a release to return to work, with restrictions requiring no prolonged standing, walking or remaining in one place. *Id.* at 1224. The plaintiff attempted to return to work, but was told by human resources that "we don't take limited releases," meaning the plaintiff had to have a full release–one without restrictions–to return to work. *Id.* Because she did not have that release, the plaintiff was told she could either resign or be fired. *Id.* She resigned, but was released to return to work without restrictions less than one month later. *Id.* The plaintiff then attempted to return to work for the defendant, completing applications for the job she had vacated (which was still open) and 12 other positions. *Id.* The defendant refused to hire her for any of them, marking each of her applications "DNP"–"do not process." *Id.* The plaintiff proceeded to trial and prevailed; the court, however, granted a judgment as a matter of law and conditionally granted a new trial to the defendant.

In reversing that ruling, the Ninth Circuit held that there was substantial evidence in the record that the defendant regarded the plaintiff as disabled. *Id.* at 1228. Among that evidence was

> "the undisputed fact that the District [defendant] refused to consider her for thirteen different maintenance and groundskeeping jobs. It also includes the testimony that the District

enforced a policy of refusing to accept 'partial releases' for employees in any job category; that policy supports an inference that the District regarded Johnson [plaintiff], and other injured employees, as unable to perform any job." *Id.* at 1228, *citing McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir 1999)(holding that a 100% healed policy discriminates against qualified individuals with disabilities), *cf. Henderson v. Ardco, supra.*

6. The Tenth Circuit: *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001)

In *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001), the plaintiff had been a peace officer for the Natrona County, Wyoming, Sheriff's Office. *Id.* at 968. Beginning in 1996, after 10 years as a peace officer, she began to suffer from several debilitating psychological illnesses, including severe depression. *Id.* She resigned from the force in October, 1996 to seek treatment for her illnesses. *Id.* In November, 1996, after having found some success with therapy and medication, she was released to return to work by her physician. *Id.* After unsuccessfully trying to find work as a peace officer in the states of Wyoming and Nevada, the plaintiff asked to be considered for either a patrol officer or any job that was or became available in the department. *Id.* The sheriff, Dovala, was reluctant to hire her and later admitted that he had passed over her application for peace officer positions between November, 1996 and October, 1997, and that he had done so without ordering the state standard psychological evaluation. *Id.* The Sheriff's department later attempted to have her decertified as a peace officer. *Id.* at 969. She filed suit, and the district court

granted summary judgment because, it held, the plaintiff could not show she was disabled under the ADA. *Id.*

In contrast, the Fifth Circuit in *Hinojosa* cited *Reeves* for the notion that "unsubstantiated assertions are not competent summary judgment evidence" and from there saw fit to reject Hinojosa's evidence of mendacity and his direct evidence of ERISA retaliation. In other words, the Fifth Circuit diluted the well-settled holding of *Reeves* that the court should review all the evidence in the record. Here the 5th Circuit did not mention any of Hinojosa's evidence or why it was not material or why it was considered trivial and in fact found facts that were non existent or were refuted.

In sum, all of the evidence that was offered by Hinojosa was considered in a light most favorable to the movant. All inferences to be drawn from the evidence were drawn in favor of the movant. The evidence that Hinojosa offered was not considered, not mentioned or explained away.

B. Prima Facie Case of Employment Discrimination under 29 U.S.C. § 1140

Section 1140 of ERISA makes it "unlawful for any person to discharge, . . . expel, or discriminate against a participant . . . for exercising any right . . . . . or for the purpose of interfering with the attainment of any right to which such a participant may become entitled under the plan. . ." This statute was primarily designed to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). The United States Court of Appeals has held that an essential element of plaintiff's proof under the statute is to show

the employer's specific discriminatory intent to engage in such conduct. *McGann v. H & H Musci Co.*, 946 F.2d 401, 405 (5th Cr. 1991). *Hines v. Mass. Mutual Life Ins. Co.*, 43 F.3d 207, 209 (5th Cir. 1995). Employee discrimination under ERISA is illegal if the employer retaliated against an employee or deprived the employee of a right to which he may become entitled. *McGann* at 408. *(emphasis added)*. Thus, a section 1140 claimant must demonstrate the employer discharged the employee with the specific intent to interfere with the employee's ERISA benefits or because he exercised his rights under an ERISA benefit plan. *Perdue v. Burger King Corp.* 7 F.3d. 1251, 1255 (5th Cir. 1993).

Jostens, Inc.'s Specific Intent to Interfere With Hinojosa's Benefits

One way, to prove specific intent under a § 1140 claim, is for the plaintiff to present facts which indicate that the employer discharged the plaintiff with the intent to interfere with the plaintiff's employee benefits. *Perdue*, 7 F.3d. at 1255. The plaintiff does not need to prove that the employer's "sole reason" for his termination was to interfere with his employee benefits, only that it was a motivating factor. *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988) quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851(3d Cir.) cert. Denied, __U.S.__, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987)(emphasis in original; citation omitted).

In the case at hand, it is clear as a mosquito frozen in amber, Josten's specific intent was to deprive Hinojosa of his employee benefits by termination of Hinojosa's employment. After approximately fifteen year tenure at Jostens, Inc., Hinojosa was terminated because of his medical condition, resultant disability and cost. The affidavit Ashcraft "created" erroneously claimed Hinojosa needed no further care after Hinojosa

had advised Jostens and Ashcraft of the need for an arthroscopic surgery and the need to see a neurologist. Also, it was represented that if Hinojosa signed the affidavit, then his outstanding bills would be paid. Of course they were not paid. Also, in March of 1999, before Hinojosa was re-injured, notes were made to his file indicating Jostens did not want another cervical disk disease case and wanted to know if his problems were work related How Jostens related the problems to 1997 is a medical mystery, particularly with no medical care until March 1999. If that were not enough to prove the specific intent to deny or cheat Hinojosa out of benefits, Judy Howard on 9/15/00, closed Hinojosa's EIBP case the same day Hinojosa was fired. Knowing he was scheduled for more care in the future. Jostens stated reason for discharge is a pretext for retaliation and discrimination because the termination is based on facts (the affidavit) that were generated to produce a result. That result, being denial of Hinojosa's disability benefits and Hinojosa's expulsion from employ.

JOSTENS, INC. IS A FIDUCIARY UNDER ERISA

The Fifth Circuit found Jostens was not a fiduciary as a matter of law. However, a fiduciary is anyone who has discretionary authority over the plan's management. 29 U.S.C. §1002 (21)(A) (West 2000); *Schoegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993), cer. denied, 510 U.S. 964 (1993); *DePalma Hotel Corp. v. Third Party Adm'rs*, 2000 WL 1515178, at 3. In *Schoegel* the Fifth Circuit held that a party exercising a mere influence over a carrier's decision is not effective control so as to render the party a fiduciary. *Id.* However, in this case Jostens, Inc. did not have a carrier and Jostens, Inc. collaborated about the job demands to ensure that Hinojosa would be required to

return to work on restricted activity and thereby denied long term disability benefits. Moreover, Section 6.1 of the Plan designates the company as the plan administrator. The stated purpose of the plan was allegedly to provide benefits to the injured employees. By causing Hinojosa's restrictions to be modified, and his accelerated return to work before physical therapy, a visit to the neurologist and possible arthroscopic surgery, Jostens, Inc. was able to deny medical and disability benefits to Hinojosa. The mission was two fold, deny benefits and fire the one who dared to use the benefits or seek them.

The Fifth Circuit skirted all of the issues, and concluded Hinojosa was entitled to no benefits even though the purpose of the affidavit was to obtain benefits and rejected all of Hinojosa's evidence and considered all the evidence in the light most favorable to Jostens. If as suggested Hinojosa was not entitled to any benefits then there was no reason for the affidavit that Ashcraft crafted.

CONCLUSION

The *Hinojosa* opinion exemplifies the need for guidance for courts to follow in determining which claims are appropriate for summary judgment in an employment discrimination case. Far from a fact specific ruling, the *Hinojosa* opinion is clearly an aberration from the accepted and usual standards in a summary judgment proceeding found in Rule 56. Further, the opinion deviates from this Court's decision in *Reeves*, and leaves uncertain the role of the trial courts in evaluating evidence and making credibility assessments. Left in obscurity is the amount of proof required by the non-movant-employee to defeat summary judgment and the question of whether *Reeves*

requires a review of the entire record from the non-movant in the most favorable light, drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence. *Id.*

To provide some vitality to the concept of *stare decisis*, some level of predictability to employee/employer rights, review by this Court is warranted.

Respectfully submitted,

JOHN E. WALL, JR.
Counsel of Record
LAW OFFICES OF
JOHN E. WALL, JR.
5728 Prospect Avenue
Suite 2001
Dallas, Texas 75206
(214) 887-0100 *telephone*
(214) 887-0173 *facsimile*
Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 04-10229

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICARDO HINOJOSA
Plaintiff-Appellant

v.

JOSTENS INC
Defendant-Appellee

April 12, 2005, Filed

COUNSEL: For RICARDO HINOJOSA, Plaintiff - Appellant: John Edward Wall, Jr, Law Offices of John E Wall Jr, Dallas, TX.

For JOSTENS INC, Defendant - Appellee: William O Ashcraft, Ashcraft Law Firm, Republic Center, Dallas, TX.

JUDGES: Before KING, Chief Judge, and GARZA and BENAVIDES, Circuit Judges.

OPINION BY: KING

OPINION: KING, Chief Judge:*

Plaintiff-Appellant Ricardo Hinojosa filed suit against Defendant-Appellee Jostens, Inc. ("Jostens"), asserting claims for: (1) disability discrimination under the

Americans with Disabilities Act ("ADA"); (2) discriminatory discharge under the Employment Retirement Income Security Act ("ERISA"); and (3) breach of fiduciary duty under ERISA. On January 22, 2004, the district court granted summary judgment in favor of Jostens and dismissed Hinojosa's claims with prejudice. Hinojosa now appeals. Addressing each of Hinojosa's arguments in turn, we AFFIRM the judgment of the district court.

We review the district court's grant of summary judgment de novo, applying the same standards as the district court. Burch v. City of Nacogdoches, 174 F.3d 615, 618 (5th Cir. 1999). Summary judgment may be entered if the record, taken as a whole, shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

We begin by addressing Hinojosa's claim that Jostens discriminated against him in violation of the ADA by terminating him based on his disability and by failing to provide him with reasonable accommodations. The district court dismissed Hinojosa's ADA claim because it concluded that he did not qualify as disabled under the ADA. n1 On appeal, Hinojosa argues that there is a genuine issue of fact as to whether he is disabled.

First, Hinojosa argues that he is substantially impaired in the major life activity of performing the manual tasks of lifting, pushing, pulling, and holding, which makes it difficult for him to perform activities of daily living such as putting on and buttoning his shirt, washing his hair, doing dishes, driving short distances, and sleeping.

Hinojosa also points to the fact that he was diagnosed with reflex sympathetic dystrophy. The ADA defines a disability as, inter alia, a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(2000); Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1119 (5th Cir. 1998). Hinojosa has the burden of demonstrating that his impairment limits a major life activity. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002). Although a major life activity includes performing manual tasks, Hinojosa must also show that the limitation on the major life activity is substantial. Id.; McInnis, 207 F.3d at 280. The Supreme Court has stated that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Toyota Motor Mfg., 534 U.S. at 198. In addition, the impairment's impact must be permanent or long term. Id. Hinojosa simply asserts that his impairment makes it difficult for him to perform activities of daily living. However, he produces no evidence whatsoever that he is prevented or even severely restricted from performing such activities. In addition, Hinojosa presents no evidence, in fact he does not even allege, that the impact of his impairment is permanent or long-term. The fact that Hinojosa was diagnosed with reflex sympathetic dystrophy does not in itself establish that he was limited in a substantial major life activity because the determination of whether a plaintiff has a disability is based on the effect of the impairment in his life, not on the name or diagnosis of the physical impairment. Taylor v. Principal Fin. Group, 93 F.3d 155, 164 (5th Cir. 1996) (citing 29 C.F.R. § 1630.2(j), App. (1995)).

Thus, Hinojosa has failed to raise a genuine issue of fact as to whether he was limited in a substantial major life activity.

Second, Hinojosa argues that he has a record of a disability because his medical records indicate he has an impairment that substantially limits major life activities. Under the ADA, a disability is also defined as having a record of a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(2000); Sherrod, 132 F.3d at 1119. Hinojosa bears the burden of showing that he has a record of an impairment. Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc., 242 F.3d 610, 615 (5th Cir. 2001). However, Hinojosa points to no evidence in the record with regard to this claim. "Unsubstantiated assertions are not competent summary judgment evidence." Ragas v. Tenn. Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). In addition, Hinojosa has not pointed to any legal authority supporting his argument. Therefore, he has inadequately briefed this claim on appeal and, as such, has forfeited it. Gen. Universal Sys., Inc. v. Lee, 379 F.3d 131, 148 (5th Cir. 2004) (per curiam). Thus, we need not review Hinojosa's claim that he has a record of a disability. n2

Third, Hinojosa argues that Jostens regarded him as having a disability because it did not assign him to work as a trainer--a job that he could do and that was available. The ADA also defines a disability as being regarded as having a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(2000); Sherrod, 132 F.3d at 1119. Jostens would be deemed to have regarded Hinojosa as disabled if it: (1) mistakenly believed that

Hinojosa had a physical impairment that substantially limited a major life activity; or (2) mistakenly believed that an actual, nonlimiting impairment substantially limited one of Hinojosa's major life activities. Sutton v. United Airlines, Inc., 527 U.S. 471, 489, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999); McInnis, 207 F.3d at 281. There is no dispute that Hinojosa had an impairment to his right arm. The question remains whether Jostens believed that Hinojosa's impairment substantially limited him in a major life activity. This circuit has held that an employer does not necessarily regard an employee as substantially limited when it discharges the employee because he can not perform his job. Ray v. Glidden Co., 85 F.3d 227, 229-30 (5th Cir. 1996); Richards v. Seariver Mar. Fin. Holdings, Inc., 59 F. Supp. 2d 616, 628 (S.D. Tex. 1998). Thus, the fact that Jostens terminated Hinojosa because he could not perform the duties of any job available at Jostens does not establish that Jostens regarded Hinojosa as substantially limited in a major life activity. Further, the fact that Hinojosa was not offered a trainer position does not establish that Jostens considered him substantially limited in a major life activity. Hinojosa was assigned to the lay-out clerk position to meet his restrictions, and Jostens's inquiry was simply meant to accommodate his limitations. In addition, Judy Howard, the employee responsible for the administration of injury claims under the Jostens Employee Injury Benefit Plan (the "Plan"), testified that she did not consider Hinojosa disabled. Also, the fact that Jostens inquired into Hinojosa's capability to perform his duties does not establish that Jostens considered Hinojosa substantially limited in a major life activity. See Tice v. Centre Area Transp. Auth., 247 F.3d 506, 515-16 (3d Cir. 2001). In fact, the ADA authorizes employers to

inquire about an employee's ability to perform job-related functions. 42 U.S.C. § 12112(d)(4)(B). Thus, Hinojosa has failed to raise a genuine issue of fact as to whether Jostens regarded him as having a disability. We therefore conclude that the district court did not err in granting summary judgment on Hinojosa's ADA claim. n3

We next turn to Hinojosa's claim that Jostens discriminated against him in violation of § 510 of ERISA, 29 U.S.C. § 1140, by terminating his employment with the specific intent to deprive him of medical benefits under the Plan. Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140. To establish a prima facie case under § 510, a plaintiff must prove, inter alia, that his employer terminated him with the specific intent to discriminate against him for exercising, or to interfere with, any ERISA right to which he is entitled or may become entitled. Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 261 (5th Cir. 2001). The district court determined that Hinojosa failed to establish his prima facie case because, at the time Hinojosa was terminated, he had no right to receive benefits under

the Plan. Pursuant to the terms of the Plan, Hinojosa's eligibility for benefits expired on April 2, 1998. Thus, when he was fired on September 15, 2000, Hinojosa did not have any right under the Plan. Accordingly, Jostens's specific intent in terminating Hinojosa could not have been to retaliate against him for exercising a right under the Plan or to interfere with any rights under the Plan. See Hines v. Mass. Mut. Life Ins. Co., 43 F.3d 207, 209-10 (5th Cir. 1995) (concluding that the district court properly granted summary judgment because the plaintiff had "no rights" under the benefit plan); Perdue v. Burger King Corp., 7 F.3d 1251, 1255 (5th Cir. 1993) (granting summary judgment on a § 510 ERISA claim because, at the time of discharge, the plaintiff did not have rights under the benefit plan with which the defendant could interfere); Van Zant v. Todd Shipyards Corp., 847 F. Supp. 69, 73 (S.D. Tex. 1994). Because Hinojosa failed to make a prima facie case of discriminatory discharge under § 510 of ERISA, Jostens was entitled to judgment as a matter of law.

Finally, we address Hinojosa's claim that Jostens breached its fiduciary duty under § 409 and § 502 of ERISA (29 U.S.C. § 1109 and § 1132 respectively) because it terminated him to discontinue his benefits. ERISA imposes personal liability on any person who is a fiduciary with respect to a plan and who breaches any of the duties imposed by ERISA. Schloegel v. Boswell, 994 F.2d 266, 271 (5th Cir. 1993). ERISA provides that a person is a fiduciary with respect to a plan to the extent he, inter alia, "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). ERISA recognizes that an employer may act in a dual capacity as both a fiduciary to the plan (as plan administrator) and as an

employer. Long v. Excel Telcomms., 1999 U.S. Dist. LEXIS 17663, No. CIV. A. 3:98-CV-3015-G, 1999 WL 1029088, at *2 (N.D. Tex. Nov. 9, 1999). An employer serving as a plan administrator assumes fiduciary status when it acts in its capacity of an administrator, but not when it acts in its capacity as an employer. Izzarelli v. Rexene Prods. Co., 24 F.3d 1506, 1524 (5th Cir. 1994).

In determining whether an employer acted as a plan administrator or as an employer, this court looks at the nature of the act and not at the intent behind it. Bodine v. Employers Cas. Co., 352 F.3d 245, 252 n.6 (5th Cir. 2003). Several courts, including the Fifth Circuit, have held that when a business decides to terminate an employee, it acts in its capacity as an employer. Id. at 251-52 (stating that "a decision to terminate an employee, who is also a Plan beneficiary, is inherently not fiduciary in nature"); see also Long, 1999 U.S. Dist. LEXIS 17663, 1999 WL 1029088 at *2. The district court dismissed Hinojosa's claim because it concluded Jostens was not a fiduciary under ERISA. Hinojosa argues that Jostens is a fiduciary under ERISA because it had discretionary authority over the Plan's management. However, because Jostens terminated Hinojosa, it was acting in its role as an employer and not as a plan administrator. Thus, Jostens was not acting as a fiduciary when it terminated Hinojosa. Since Hinojosa has not produced any evidence that Jostens was acting in its capacity as a plan administrator when it fired him (which would have given it fiduciary status), the district court did not err in granting summary judgment on Hinojosa's breach of fiduciary duty claim under ERISA.

Accordingly, the judgment of the district court is AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

n1 The ADA makes it unlawful for an employer to discriminate against an employee who is a qualified individual with a disability because of that employee's disability. 42 U.S.C. § 12112(a) (2000). Under the McDonnell Douglas burden-shifting framework, to make a prima facie case of discrimination, a plaintiff must establish that he: (1) has a disability; (2) is qualified for the position; and (3) was discriminated against because of his disability. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); McInnis v. Alamo Cmty. Coll. Dist., 207 F.3d 276, 279-80 (5th Cir. 2000) (applying the McDonnell Douglas burden-shifting framework to a case brought under the ADA). If a plaintiff makes this prima facie showing, then the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. McInnis, 207 F.3d at 280. Once the employer articulates such a reason, the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the reason was merely a pretext for discrimination. Id.

n2 Even if we did review Hinojosa's argument, he has failed to raise a genuine issue of material fact as to whether he has a record of an impairment. This court

has specifically rejected that injury, surgery, hospitalization, and inability to work can establish a record of a disability as a matter of law. Pryor v. Trane Co., 138 F.3d 1024, 1028 (5th Cir. 1998). In addition, restrictions indicating an inability to perform continuous, heavy lifting or an inability to perform a particular job do not necessarily constitute a record of disability. Id. This court requires a record of an impairment that substantially limits a major life activity. Id. There simply is no such record here.

n3 Since we have concluded that Hinojosa failed to raise a genuine issue of fact with respect to a prima facie case of discrimination under the ADA, we need not address Hinojosa's arguments that: (1) Jostens's reason for terminating him was a pretext for discrimination; and (2) Jostens discriminated against him by failing to provide reasonable accommodations.

Civil Action No. 3:02-CV-0391-K

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD HINOJOSA,
Plaintiff,

v.

JOSTENS, INC.,
Defendant.

Filed January 22, 2004

ORDER

Before the Court is Defendant Jostens, Incorporated's ("Jostens") Motion for Summary Judgment. For the following reasons, the Court GRANTS the motion.

I. Factual Background

Plaintiff Ricardo Hinojosa ("Hinojosa") worked as a diamond setter, a precision hand skill position, for Jostens. On April 2, 1997, Hinojosa was injured while performing his job. He submitted an Employee Injury Report on April 23, 1997, which notified Jostens of an injury to his right shoulder sustained while removing a stone from a ring. Hinojosa first sought medical treatment for his injury in February 1999. Hinojosa was off work from March 22, 1999, until September 11, 2000, due to his injury.

In mid August 2000, Hinojosa requested being placed on light duty. After approval from his doctor, allowing him to work four hours a day, Jostens offered Hinojosa the position of layout clerk, the lightest job at the plant. He began work as a layout clerk on September 11, 2000, working half days. After two half-days of working, Hinojosa continued to suffer pain in his shoulder while performing his layout clerk position duties. Four days after returning to work, Jostens terminated Hinojosa because it believed he could not perform the duties of either a diamond setter, his original position, or a layout clerk position, the lightest job. Hinojosa filed the instant action in state court which Jostens removed to this Court.

Jostens is a nonsubscriber to the Texas Workers' Compensation Act. Jostens provides medical and wage replacement benefits through its Employee Injury Benefit Plan ("Plan"). According to the Plan, the period for which a participant is eligible for payment of medical and wage replacement benefits begins on the date that the injury was sustained. The period of payment ends on the earlier of: (1) the day the participant is released to return to full duty by the treating physician or the day the physician determines no further treatment is necessary for the injury; or (2) the day which is 52 weeks after the day of the injury.

II. Standard of Review

Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v.

Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2551 (1986). The moving party bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 322-25, 106 S.Ct. at 2551-54. Once a movant makes a properly supported motion, the burden shifts to the nonmovant to show that summary judgment should not be granted; the nonmovant may not rest upon allegations in the pleadings, but must support the response to the motion with summary judgment evidence showing the existence of a genuine fact issue for trial. Id. at 321-25, 106 S.Ct. at 2551-54; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-57, 106 S.Ct. 2505, 2513-14 (1986). All evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993 (1962).

III. Plaintiff's Claims

Hinojosa asserts claims against Jostens for (1) disability discrimination under the American with Disabilities Act ("ADA"), (2) discriminatory discharge under the Employee Retirement Income Security Act ("ERISA"), and (3) breach of fiduciary duty under ERISA.

A. Disability Discrimination Claim

Hinojosa claims that Jostens violated the ADA in discriminating against him because of his disability, his shoulder and arm injury, when it: (1) assigned him to a job requiring repetitive use of his injured shoulder, arm and hand, aggravating the injury; and

(2) hired less qualified non-disabled people instead of assigning him for jobs he was qualified to perform, and treated him less favorably than non-disabled employees and applicants.

In a case involving an ADA claim made by an allegedly disabled employee, the employee has the burden of proving (1) he has a disability, (2) he is qualified for the position in which he seeks employment, and (3) he was discriminated against solely because of his disability. Gonzales v. City of New Braunfels, Texas, 176 F.3d 834, 836 (5thCir. 1999). The ADA defines "disability" as a (1) physical or mental impairment that substantially limits one or more of the person's major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). A physical impairment alone does not qualify as a disability under the ADA. Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 195 (2002). A determination of a person's disability is done on a case-by-case basis. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999).

1. Limitation of Major Life Activities

Hinojosa claims in his amended complaint that his shoulder and arm injury is a disability which substantially limits one or more major life activities, such as lifting, pushing, pulling, and holding. In his deposition, Hinojosa stated that his injury limited other major life activities of working, enjoying life, and being happy. To qualify as disabled under section 12102(2)(A), Hinojosa must prove: (1) he has a physical or mental impairment; (2) the impairment limits a major life activity; and (3) the limitation on the major life

activity is substantial. See 42 U.S.C. § 12102(2)(A). It is not disputed that Hinojosa suffers from a physical impairment. Therefore, the Court will address whether the impairment substantially limits a major life activity.

The Equal Employment Opportunity Commission, the agency with authority to carry out certain ADA provisions, defined "major life activity" to include "caring for oneself, performing a manual task, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(j). Considerations in determining whether a "major life activity" is "substantially limited" are: (1) the nature and severity of the impairment; (2) the duration or anticipated duration of the impairment; and (3) whether the impairment is permanent, anticipated to be permanent, and any long-term effect. 29 C.F.R. § 1630.2(j).

a. Manual Tasks

Hinojosa contends he is prevented from major life activities of lifting, pushing, pulling, and holding. "Major life activity" other than working concerns activities which are centrally important to daily life. Toyota Motor Mfg., 534 U.S. at 197-98. The issue is whether the plaintiff is unable to perform the various tasks essential to most people's daily lives, not whether the plaintiff is incapable of performing the tasks associated with his specific job. Id. at 200-01. The Supreme Court noted that manual tasks unique to a certain job are not necessarily central to most people's lives, therefore, these tasks may have limited relevance in the determination. Id. at 201. Hinojosa fails

to present any evidence indicating how his substantially limited abilities to lift, push, pull, and hold have made him unable to perform tasks involving these abilities which are centrally important to people's daily lives. Hinojosa testified that he is incapable of performing certain functions of the Diamond Setter and Layout Clerk positions; however, whether he can perform certain functions of particular jobs is not the issue in this analysis. See id. (appellate court should not consider plaintiff's inability to do manual work in her specialized assembly line job as sufficient proof of substantially limited ability to perform manual tasks).

Hinojosa must provide evidence that he is incapable of performing the normal activities of daily life that involve his ability to lift, push, pull, and hold. See Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1120 (5th Cir. 1998). Hinojosa presented no such evidence. In his response to Jostens' motion for summary judgment, Hinojosa contends, "The records in Defendant's own appendix reflect [Hinojosa suffers from an impairment that substantially limits a major life activity]. `He is having a lot of difficulty performing activities of daily life such as putting on a shirt, buttoning a shirt, washing his hair, doing dishes or driving short distances, not to mention sleep difficulty.'" However, Hinojosa fails to point the Court to where in Jostens' appendix this evidence is. It is not this Court's duty to scour through the summary judgment record to find evidence supporting a party's opposition to summary judgment. Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998) (party opposing summary judgment required to identify specific evidence in record and articulate exact way it supports his claim). What is before the Court is Hinojosa's deposition

testimony that, while currently working in a full-time position for a wire manufacturing company, he lifts pallets weighing approximately 25 pounds onto the machine he operates. Based on the summary judgment evidence, the Court cannot conclude that his major life activities of these manual tasks have been substantially limited.

b. Working

Although the EEOC has defined "major life activity" to include working, the Supreme Court has been its reluctant to make that determination. Toyota Motor Mfg., 534 U.S. at 200. However, the Supreme Court did indicate that a plaintiff must meet certain requirements when working is the activity alleged. Id. (Supreme Court hesitant to hold working is "major life activity" because of "conceptual difficulties inherent" in argument). The plaintiff is required to show an inability to work in a broad range of jobs, not just a specific job. Sutton, 527 U.S. at 491 (citing 29 C.F.R. § 1630.2(j)(3) ("substantially limits" means person significantly restricted in ability to perform either class or broad range of jobs as compared to average person having equal training, skills, and abilities)). An impairment must prevent a plaintiff from performing more than merely one kind of job, a specialized job, or a particular job he desires in order for his major life activity of working to be substantially limited. Sutton, 527 U.S. at 492 (citing 29 U.S.C. § 1630.2(j)(ii)(A)-(B) (EEOC identified numerous factors courts should consider when determining whether person substantially limited in major life activity of working, such as geographical area to which person has reasonable access, number and

kinds of jobs using like "training, knowledge, skills or abilities")). If many different types of jobs are available, the plaintiff is not precluded from a broad range of jobs. Sutton, 527 U.S. at 492.

Hinojosa failed to present evidence that he is unable to work in a broad range of jobs. Although he presented evidence that he is unable to perform some of the functions of the Diamond Setter and Layout Clerk positions, this is insufficient. See id. Jostens, however, presented evidence from Joyce Shoop, a Certified Rehabilitation Counselor, that Hinojosa was not precluded from a broad range of jobs, and there were several jobs available to him. Id. at 493 (plaintiffs' claim that defendant regarded them as having substantially limiting impairment not supported because their allegation involved only one particular position, and evidence established several other positions involving same stalls available to them). After meeting with Hinojosa and learning his educational and professional background, Ms. Shoop conducted a cursory job search and reported Hinojosa was qualified for several jobs in the Dallas area. She also noted that a more extensive search done by Hinojosa himself would likely result in more opportunities. This evidence establishes that many different types of jobs are available to Hinojosa. See id.

Even more significant is the evidence establishing that Hinojosa has been employed since his termination from Jostens. Hinojosa began working as a property inspector in a self-employed capacity. He also operates machinery for a wire manufacturing company. When he began with the company, he operated a clipper

machine, which required him to place empty spools on the machine then remove the spools once they were full. Hinojosa estimated the full spools weighed ten pounds. Hinojosa was then promoted to operate another machine. Hinojosa is required to place empty wood pallets, weighing approximately 25 pounds, on this machine. The fact that Hinojosa is both employed by another company as well as self-employed is dispositive of his allegation that he is substantially limited in the major life activity of working. See Adair v. W.H. Braum's, Inc., 1999 WL 242696, *6 (N.D. Tex. 1999) (J. Solis) (fact that plaintiff currently employed dispositive of her alleged substantial limitation on working).

The Court cannot conclude based on the evidence that Hinojosa is substantially limited in his major life activity of working. The evidence merely establishes Hinojosa cannot perform the duties of Diamond Setter or Layout Clerk. See Sutton, 527 U.S. at 492 (impairment must prevent plaintiff from performing more than merely one kind of job, specialized job, or particular job plaintiff desires to substantially limit plaintiff's major life activity of working). The evidence does not show Hinojosa is prevented from a broad range of jobs. The evidence does establish not only that there are many jobs in the area for which he is qualified, but that he indeed is employed by a company, as well as self-employed; therefore, his "major life activity" of working is not substantially limited. See id. (if many different types of jobs available, plaintiff not precluded from broad range of jobs, so "major life activity" of working not substantially limited). Hinojosa does not qualify as disabled under section 12102(2)(A).

c. Being Happy and Enjoying Life

While there are numerous abilities considered to be "major life activities," the Court could locate no authority, and Hinojosa pointed the Court to none, for finding happiness and the enjoyment of life to be "major life activities." The Court refuses to conclude that these are recognized "major life activities."

2. Record of Impairment

Hinojosa claims that his medical records establish "he has an impairment that substantially limits major life activities; therefore, he is also `disabled' because he has a `record of a disability.'" Having a record of an impairment that substantially limits a major life activity does qualify as being disabled. 42 U.S.C. § 12102(2)(B). However, Hinojosa fails to present any evidence establishing a record of the impairment. Instead, he merely alludes to his medical records establishing a record. See Ragas, 136 F.3d at 455 (unsubstantiated assertions not competent summary judgment evidence). It was Hinojosa's burden to indicate to the Court in his response what evidence established this allegation. See id. (party opposing summary judgment required to identify specific evidence in record and articulate exact way it supports his claim). Consequently, Hinojosa has failed to establish a record of an impairment.

3. Regarded as Having Impairment

Section 12102(2)(C) provides that a person is disabled if he is regarded as having an impairment that substantially limits one or more major life activity. 29

U.S.C. § 12102(2)(C). A person may qualify under this definition if: (1) a covered entity mistakenly believes a person has an impairment that substantially limits one or more major life activities; or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. Sutton, 527 U.S. at 459. A "covered entity" is an employer, employment agency, labor organization, or joint labor-management committee. 29 U.S.C. § 12111(2). The crux of this definition is that the covered entity had mistaken beliefs about the person. Sutton, 527 U.S. at 459. An employer is entitled to conclude that (1) an individual's certain physical attribute or medical condition, which cannot be considered an impairment, is more desirable than others, and (2) an individual's certain limiting, although not substantially limiting, impairment make him ill-suited for a job. Id. at 491.

In his amended complaint, Hinojosa alleges that Jostens terminated him because either it mistakenly believed that he had a physical impairment that substantially limited one or more major life activities or that Hinojosa had an actual non-limiting impairment that substantially limited one or more major life activities. Jostens' evidence establishes that Hinojosa was terminated because he could not perform the Diamond Setter or Layout Clerk positions or any other position available at that time with Jostens. This alone, however, does not establish he was terminated because Jostens regarded him as having a disability. See Richards v. Seariver Maritime Financial Holdings, Inc., 59 F. Supp. 2d 616, 628 (S.D. Tex. 1998), aff' d, 189 F.3d 467 (5th Cir. 1999) (report from defendant's human resources committee that plaintiff unable to do

other jobs because of medical restriction not evidence alone of defendant having regarded plaintiff as disabled).

Hinojosa claims in his response that if Jostens did not perceive him as disabled, they would have offered him the job of a Diamond Setter trainer. In support of his argument, Hinojosa points the Court to various email correspondence between Jostens employees relating to the position in which Hinojosa would be placed. However, these emails tend to confirm Jostens summary judgment evidence from Judy Howard, a Human Resources employee of Jostens, who testified that Hinojosa was placed in the Layout Clerk position rather than the trainer position to comply with his treating physician's work restrictions. In an email from Ms. Howard to David Bauereis, another Jostens employee, she stated that the Layout Clerk position required "less hand, wrist, arm, shoulder movement laying out rings than training".

Hinojosa also argued in his response that Jostens' inquiry into his ability to perform his duties is evidence that it regarded him as disabled. The Court, however, does not agree. Jostens' inquiry into Hinojosa's ability to perform duties associated with his job does not equate to evidence that it regarded him as disabled. See 42 U.S.C. § 12112(d)(4) (B); 29 C.F.R. § 1630.14(c); Tice v. Centre Area Transp. Auth., 247 F.3d 506, 515-16 (3rd Cir. 2001) (to use defendant's request or inquiry as evidence of "regarding" plaintiff to be disabled, plaintiff must raise genuine fact issue about whether request showed defendant believed plaintiff unable to work broad range of jobs).

Consequently, Hinojosa has failed to establish that Jostens terminated him because it believed him to have an impairment that substantially limited a major life activity, whether mistaken or correct. See id.

Summary judgment on Hinojosa's claim of discriminatory discharge under the ADA is proper.

B. Discriminatory Discharge Claim under ERISA

Hinojosa claims Jostens discriminated against him in violation of ERISA when he was terminated for exercising his rights under the employee benefit plan ("Plan") and seeking benefits for healthcare in connection with the treatment of his work- related injuries under the Plan. Hinojosa contends he has been unable to get the medical care he requires and benefits he would have been entitled to under the Plan if he had not been terminated.

To establish a prima facie case of discrimination under ERISA, a plaintiff must show that the employer terminated the plaintiff with specific intent to discriminate against him for exercising an ERISA right or to prevent the attainment of benefits to which the plaintiff was entitled under an employee benefit plan. Holtzclaw v. DSC Communications Corp., 255 EM 254, 260 (5th Cir. 2001); Matassarin v. Lynch, 174 F.3d 549, 569 (5th Cir. 1999). The plaintiff must also prove that he was physically qualified for the position from which he sought. Holtzclaw, 255 F.3d at 261.

In this case, at the time Hinojosa was terminated, he had no right to receive benefits under the Plan. As previously stated, the period for which a participant is eligible for payment of medical and wage replacement benefits begins on the date that the injury was sustained. The period of payment ends on the earlier of: (1) the day the participant is released to return to full duty by the treating physician or the day the physician determines no further treatment is necessary for the injury; or (2) the day which is 52 weeks after the day of the injury. The evidence establishes that the injury to Hinojosa's right shoulder occurred on April 2, 1997. Hinojosa's eligibility to receive any benefits under the Plan for this injury ended on April 2, 1998, 52 weeks after the injury date; Hinojosa was never released to return to full duty by his termination date. Because his termination from employment was in September 2000, more than one year after his eligibility ended, Hinojosa was not eligible to receive benefits under the Plan for his injury. Although Jostens voluntarily continued to pay these expenses until his termination, this does not change the fact that under the Plan, he was ineligible to receive any benefits as of April 2, 1998. See Washington v. Occidental Chem. Corp., 24 F. Supp. 2d 713, 730 (S.D. Tex. 1998) (defendant-employer did not violate ERISA when it terminated plaintiff's short term disability benefits, which it had continued to voluntarily pay, because plaintiff no longer eligible for those benefits). Jostens could not have had specific intent to discriminate against Hinojosa for something he had no right to receive. See Holtzclaw, 255 F.3d at 260. Therefore, Hinojosa cannot establish a prima facie case of discriminatory discharge under ERISA. See id. This claim fails as a matter of law.

C. Breach of Fiduciary Duty Claim under ERISA

Hinojosa claims Jostens violated its duty as a fiduciary under the Plan when it terminated him for pretextual reasons and with the intent to deprive him of rights and benefits under the Plan.

ERISA defines a fiduciary as someone who has "any discretionary authority or discretionary responsibility" in the administration of an employee benefits plan. 29 U.S.C. § 1002(21)(A). Breaching that duty results in personal liability. 29 U.S.C. § 1009(a).

This Court assumes without deciding that Jostens is the administrator of the Plan. An employer serving as a plan administrator assumes fiduciary status when and to the extent it acts in the capacity of an administrator, but not when it conducts business not regulated by ERISA. Izzarelli v. Rexene Prods. Co., 24 F.3d 1506, 1524 (5th Cir. 1994); Amato v. Western Union Internat'l, Inc., 773 F.2d 1402, 1416-17 (2nd Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986). Therefore, the employee must show the employer was acting as an administrator of the employee benefit plan when it terminated the employee. Long v. Excel Telecommunications Corp., 1999 WL 1029088, * 1 (N.D. Tex. 1999). The Court looks to"the nature of the acts taken by the employer - not the intent behind them," to determine in what role the employer acted. Id., at *2. When an employer elects to terminate an employee it is acting as an employer, not as a fiduciary. Id. (citing Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988)).

In this case, Hinojosa's claim is based on Jostens terminating him. He alleged in his complaint that

Jostens breached its fiduciary duty under ERISA when it terminated him for pretextual reasons and with the intent to deprive him of his rights and benefits under the Plan. Case law establishes that Jostens was acting as an employer, not a plan administrator, when it terminated Hinojosa. See Long, 1999 WL 1029088, at *2. Hinojosa fails to offer any evidence in his response that Jostens was acting as an administrator rather than as an employer. Because terminating an employee is the action of an employer rather than a plan administrator, and all Hinojosa's allegations were based on Jostens terminating him, there is no basis for Hinojosa to prevail on his claim for breach of fiduciary duty. See id., at *2-3 (court dismissed case where all plaintiff's allegations based on his termination, because defendant acting as employer rather than plan administrator). Summary judgment on this claim is proper.

IV. Conclusion

For the reasons stated above, the Court GRANTS Defendant's motion for summary judgment. This case is DISMISSED WITH PREJUDICE.

SO ORDERED.

January 22, 2004.

ED KINKEADE
UNITED STATES DISTRICT JUDGE

Civil Action No. 3:02-CV-0391-K

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD HINOJOSA,
Plaintiff,

v.

JOSTENS, INC.,
Defendant.

DECLARATION OF RICARDO HINOJOSA

I, Ricardo Hinojosa, make the following Declaration. I am aware that this Declaration will be filed in a federal court and that it is the legal equivalent of a statement under oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above-styled case and I hereby state the following:

I was employed by the Defendant, Jostens, Inc., from approximately September 23, 1985 until my termination on September 15, 2000.

I was injured during the course and scope of my employment on or about April 2, 1997. I was working as a Diamond setter at the Jostens facility in Denton, Texas at this time and I felt pain in my right arm while removing a stone from a ring. I reported the injury to Jostens, but was denied treatment. That is, I requested medical care but was not sent to a doctor. I was later

transferred to a supervisor position at the Jostens Plant in Laredo, Texas which did not require the use of my arms or stone setting. I was supervising and training others which did not require the use of my right arm. I can train and it is not as physically demanding as a job as a layout clerk.

In approximately March 1999, I was transferred back to the Jostens Plant in Denton, Texas from Laredo, Texas. I was placed in a position as a diamond setter. The pain, restriction of motion, muscle shrinking and muscle spams in my arm became worse when I resumed this job. I went to the doctor for treatment. I was restricted from work by Dr. Kristoferson on or about March 22, 1999 to undergo several medical tests, including a bone scan, MRI, and to consult with a neurologist. (Attached hereto as exhibits 1 and 2 are true and correct copies of work restrictions From Dr. Kristoferson). I had a Nerve Conduction and EMG test performed by a neurologist, Dr. Ravindran on or about April 22, 1999. (Attached hereto as Exhibits 3 and 4 are true and correct copies of Dr. Ravindran's 4/22/99 report and his 4/6/99 restrictions referenced in the report). After the EMG, I was released to return to work with Dr. Ravindran's restrictions of no work requiring repetitive movement of my right upper extremity or hands. (See Exhibits 3 and 4). I returned to work on or about May 3, 1999 with the restrictions of no repetitive right arm or hand movement. When I returned to work, contrary to my medical restrictions, my supervisor, Mr. Theotis Watts placed me in the Coating Center performing work that required repetitive continual movement of my right hand and arm. I was required to place rings on a rack for placement on the coating machine. The rack was on a table and required me to reach up to place the

rings on it. This job required me to place approximately 100-200 rings an hour on the rack. I am right-handed. I performed this job for approximately a week during which time my arm and hand pain became much worse. After that week, my arm was so much worse that I could not raise it, could not reach behind me, could not reach over head and even had difficulty brushing my teeth. I returned to the doctor and was then removed from work indefinitely due to my injury. I was then off from work because of my injuries from approximately May 11, 1999 until September 11, 2000. During that time, I had radial tunnel release surgery performed on my right arm in January 2000. I was also prescribed physical therapy in June 2000, but Jostens denied approval for payment. In August 2000, I was given an injection for pain in my shoulder and again prescribed physical therapy.

On September 6, 2000, two days before my first therapy appointment, Judy Howard, Employee Insurance Benefits Program ("EIBP") for Jostens, informed me that she had cancelled my therapy session and was going to speak with the doctor (Dr. Finnegan).

On September 7, 2000, I was released to return to work 4 hours a day beginning September 11, 2000. Judy Howard called me on September 8, 2000 and scheduled me to work on September 11, 2040 from 8 a.m. to 12 p.m. I reported to work as instructed by Howard. Judy Gonzales, my supervisor that I was working for at the time in the Lay Out department said I was doing a good job and that she was happy to have someone who knew how to do the job working for her.

On September 13, 2000, after having worked for two day, Howard sent me home stating that Jostens was worried that I was going to hurt my shoulder. I told her I wanted to keep working, but she insisted, and told me to leave quietly and that she would inform my supervisor that I would return the next day.

The on September 14, 2000 at approximately 8:30 a.m., Howard called to me to her office. Howard took me to a conference room and introduced me to a gentleman that identified himself as William 4. Ashcraft, an employee from the Benefits Department for Jostens. He did not give me a business card. He told me that he came to see how he could help me. I told him that I wanted to get a shoulder arthroscopy because I still had pain in my shoulder. He asked Howard and I if we knew how much that would cost, but neither of us could say how much it would cost. He told me that he was going to have a meeting with management later in the afternoon and that he would ask if they would authorize the arthroscopy. I told him that if I could get my medical bills paid, my doctor had told me that he would refer me to a neurologist. He then asked me if I was sure that the machine that we used at Jostens for diamond setting was what caused my pain. I told him he would have to speak to an expert on machinery because I was not sure. He then told me that Jostens knew that the machine was causing pain to many diamond setters. He then asked me to wait in the cafeteria while he typed up what we had talked about. I asked him if I could return to work while I waited, but he said no to wait in the cafeteria, which I did.

The same man later called me back to the conference room and asked me to sign some papers. While reading

the papers, I noticed that what he had typed stated that I did not need any medical treatment to be given by Jostens EIBP. I told him that I did not say that and I scratched it out. He said that I had to sign the paper in order for him to present it to the directors of Jostens. He said that without my signature, he could not help me get medical care and could not get my outstanding medical bills paid. I did not understand what an affidavit was. I asked him if the affidavit was legal document, and he said "No" it was just a paper that he needed me to sign so he could show the Jostens management, so the man could get my benefits paid. I then signed the paper and Judy Howard notarized it (a true and correct copy of the paper I signed is attached as Exhibit 5). I asked him why the paper had to be notarized and he said it was the only way to prove that I signed it. After I signed the paper he told me to return the next day at 7 a.m. so that he could help me out and let me know what they [Jostens] had decided. I asked if I could return to work, but he said not until after the meeting the following day.

I did not understand the purpose of the September 14, 2000 meeting referenced above but was told by Mr. Ashcraft that he was there to try and help me get my medical benefits paid for my work related injuries. At no time during my meeting with him did he explain to me, or did I know, the distinction in the law between an injury and an aggravation of an injury. If he had explained the distinction between an injury and an aggravation of an injury in the law, I would not have signed the affidavit as it was written and I would have asked that a reference be made to the aggravation of my injury which occurred in May 1999. He however did

not explain the legal significance of the aggravation of my injury.

Ashcraft misrepresented to me that purpose of the affidavit. When I asked him what the purpose of the affidavit was, he told me that the affidavit was needed to get my medical expenses paid. This representation by Ashcraft was not true because the next day I was terminated from my job and my medical benefits were discontinued. I had specifically told him during our meeting that T needed more medical care, including possibly surgery and a referral to a neurologist. In agreeing to sign the affidavit, I relied on his representations that he would use the affidavit to help me get my medical expenses paid.

Also had Ashcraft told me that he was a lawyer and that he was working for Jostens and that his purpose was to provide a defense to Jostens in the event I tried to sue them, I would have consulted with an attorney before ever signing anything, including the affidavit. But because he represented that he was working only for the Jostens benefits department and was there to help me, I relied on the representations and signed the affidavit that failed to include a definition of aggravation of preexisting condition. The affidavit I signed for him is true and correct, but it neglects to take into account the subsequent aggravations of my injuries that occurred by reason of my return to work and being placed in jobs by Jostens that were contraindicated by doctors restrictions. Also, the Affidavit says that I can't work, but the affidavit fails to state that I can do work as a trainer. Judy Howard had told me when I returned to work on or about September 11, 2000 that the only position open at

Jostens was a lay out position, but did not tell me about an open trainer position, so I signed the affidavit. In reviewing my files from Jostens, I now know a trainer position was open, but I was not offered this position. In fact, this position was overtly concealed. Had Ashcraft disclosed that other positions were available to me, such as the trainer position, I would not have signed the affidavit saying that there were no jobs I could do. Also, in retrospect, I know that I will always be in pain so I could have continued in layout, but would be in pain. Many people work in pain at Jostens. Specifically, Rodolfo Buenostro was fired for false reasons after years of being in pain.

Had Ashcraft told me that an affidavit was a legal document, with legal consequences, I would not have signed the affidavit without consulting with a lawyer. Ashcraft falsely told me that an affidavit was not a legal document. In agreeing to sign the affidavit for Ashcraft, I relied on Asheraft's representation to me that this was not a legal document and that it was going to be used to help me.

I suffered damage as a result of my reliance of Ashcraft's representations because, the next day I was terminated, my medical benefits were cut off and now Jostens has used the affidavit I signed for Ashcraft to try and claim that my condition was so disabling there was no work I could do.

On September 15, 2000, I returned to work at 7:00 a.m. and waited until approximately 9 a.m. before Terry Jones, a representative from Human Resources at Jostens, called me into a conference room. I noticed that Ashcraft who I had been speaking with the day before

and who had said he would help me was present at the meeting but seemed to avoid me and would not make eye contact. Jones told me that I had used all the time allowed by Jostens EIBP to be paid while not at work. Jones told me that the limit was 27 months and that I had been paid for 44 months. Jones said this was the time she calculated and that she was starting from the first time I had pain. Jones said I would be denied benefits from that time forward. I was then offered a deal in which I would sign a letter of resignation stating that because of my medical condition I would not be able to perform any job offered by Jostens and in return they would try and help me get unemployment benefits and a letter from Dr. Finnegan stating I could work a light duty job as long as it was outside of Jostens. In addition I was offered $2500.00 not to speak to anyone about my situation at Jostens or the deal would be terminated. I refused this deal and was told I was terminated by Jones. I was told to return my work badge. I was escorted out by a security guard and told never to return to Jostens' property.

In approximately February 2001, I attended a benefit review conference at the Texas Workers' Compensation Commission Field Office in Denton, Texas. When I arrived for the conference, I recognized Ashcraft, the same man who had told me he was with the Jostens Benefits Office and had me sign the attached affidavit. At this conference the same man represented himself to be William Ashcraft, a lawyer representing Jostens. At no time during my September 2000 meetings with Mr. Ashcraft did he inform me that he was a lawyer for Jostens or that I should seek outside legal counsel before signing any paperwork. In fact, Ashcraft specifically told me that he was with the Jostens Benefits Department.

Because Terry Jones had told me that after my termination Jostens would no longer pay for my medical expenses, I applied for insurance coverage through my wife's employer's insurance plan. As I had explained to Mr. Ashcraft prior to my termination, I needed to see a neurologist and have arthroscopic surgery. Under the Jostens insurance plan, 100% of my medical expenses for my work-related injuries were paid for. Under my current insurance plan, only about 85-90% of my medical expenses are paid, but many of the treatments and medications that I need are not approved by the insurance company. For instance, my current insurance has not approved an exam by a neurologist. Also, I pay approximately $48.00/month for insurance premiums. Under Jostens plan for work related injuries, I did not pay an insurance premium. Also, I was denied coverage under my current insurance plan for approximately 6 months for my work-related injuries. During that time, I stared seeing medical providers including Dr. Connally and Dr. Pretorius, who were approved by the new insurance plan. I have not had the arthroscopic surgey. I have outstanding balances for medical expenses related to treatment for my injury at Jostens in excess of $1,600.00 (attached hereto as Exhibit 6 are true and correct copies of billing statements and collection statements for my medical expenses related to my injury at Jostens). I have been unable to afford to pay for these expenses or for an exam by a neurologist or the arthroscopic surgery because my termination from Jostens left me without income or the ability to pay for these expenses. I began working again approximately 5 months ago, but this is a lower paying job (I earned approx. $14.82/hour at Jostens and I currently earn $10.50/hour). I still need medical care and have lost

wages due to my injuries, termination and the way Jostens and Ashcraft terminated my employment. Currently, I am taking pain medication for depression as a result of my injuries and termination.

Prior to my return to work on 9/11/00, when I asked what I would be doing, I was told the only position open was that of a layout clerk because of my physical condition. Jostens found a job I was doing as a layout clerk. I never refused to do the job nor did I claim I could not do it. The affidavit I signed did not take into account the trainer position which was concealed from me. I never said I could never be able to work again in the affidavit prepared by Ashcraft. I needed care and a diagnosis and wanted to get my condition treated.

I declare, under penalty of perjury, that the forgoing is true and correct. Executed this 31st day of July, 2003.

Ricardo Hinojosa

CAUSE NO. 01-02717-D

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

RICHARD HINOJOSA,
Plaintiff,

v.

JOSTENS, INC., ASHCRAFT LAW FIRM A PROFESSIONAL CORPORATION and WILLIAM O. ASHCRAFT, Individually
Defendant.

AFFIDAVIT OF RANDALL J. SHAFER

J. SHAFER)
)
STATE OF TEXAS COUNTY OF DALLAS)

Before me, the undersigned Notary Public, on this day personally appeared Randall J. Shafer, who being by me duly sworn upon his oath deposed and stated as follows:

1. "My name is Randall J. Shafer. I am over twenty-one years old, and have never been convicted of a crime of moral turpitude. I am fully competent to testify to the matters stated herein and all statements made herein are within my personal knowledge and are true and correct.

2. 1 am an attorney licensed to practice law in the state of Texas and have been so licensed since 1974. I am

a member in the law firm of Shafer & Mueller, P.L.L.C. and am familiar with the ethical standards required of lawyers under the Texas Disciplinary Rules of Professional Conduct.

3. I have reviewed the affidavit of Ricardo Hinojosa, the deposition taken of William Ashcraft and hearing testimony in connection with this case. It i my opinion, based upon. these facts, that Mr. Ashcraft may have violated various disciplinary rules set forth in the Texas Disciplinary Rules of Professional Conduct as set forth below.

4. When Mr. Ashcraft interviewed Mr. Hinojosa concerning his work-related injuries at Josten's, Inc., Mr. Ashcraftt should have disclosed and made it clear to Mr. Hinojosa that he was Josten, Inc.'s lawyer. Instead, he stated that he was Josten's counsel and worked with Josten's on its employee injury program.

5. When Mr. Ashcraft indicated he was taking Mr. Hinojosa's statement, he should have informed Mr. Hinojosa of the differences between a statement and an affidavit and that an affidavit is sworn to under oath and can be used in a court of law as testimony. I believe that any attorney who prepares a document for signature by a party, potential party, or witness should explain the legal impact and import of the document. It is clear from the deposition testimony, the hearing and Mr. Hinojosa's affidavit that this did not occur and that Mr. Hinojosa, as with many people in his peer group, are not familiar with what the term counsel means.

6. I believe that Mr. Hinojosa's affidavit was obtained improperly and Mr.. Asheraft's conduct in

interviewing Mr. Hino joss and preparing an affidavit for signature by Mr. Hinojosa was in violation of: Rule 4.03 (by not making reasonable efforts to correct the misunderstanding concerning the lawyer's role in the matter) by failing to communicate and/or explain Ashcraft's status as Josten's lawyer to Hinojosa, Mr. Ashcraft's conduct may also constitute a violation of (1) Rule 3.04 (by assisting a witness to testify falsely by omitting material facts) by preparing an affidavit for the unrepresented injured employee, Mr. Hinojosa, that served to protect his client-the employer, Josten's, Inc., and which failed to disclose Mr. Hinojosa's medical condition at the time the affidavit was prepared, and (2.) Rule 4.01 (by failing to disclose a material fact to a third person when disclosure is necessary to avoid knowingly assisting a fraudulent act perpetrated by his client) which Ashcraft may have done by failing to inform Hinojosa of Ashcraft's role as Josten's lawyer and failure to inform Hinojosa of the legal implications of his affidavit.

7. Based on Mr. Ashcraft's misrepresentations and/or his failure to disclose certain information to Mr. Hinojosa, this Court as gatekeeper could disqualify Mr. Ashcraft as counsel for Josten's, Inc. in order to maintain the legal. integrity of this profession. Mr. Ashcraft acted improperly in obtaining the affidavit from Mr. Hinojosa and may have conspired to deprive Mr. Hinojosa of his ability to bring suit for work-related injuries he sustained at Jostens, Inc.

8. Further, based on Mr. Ashcraft's unethical conduct in obtaining a potential litigant's affidavit without full and proper disclosure, the Affidavit of Mr.

Hinojosa should be suppressed as evidence in this lawsuit.

FURTHER AFFIANT SAYETH NOT."

RANDALL J. SHAFER

SUBSCRIBED and SWORN to before me this 23rd day of January, 2002.

NOTARY PUBLIC

My commission expires: 6/6/05

CAUSE NO. 01-02717-D

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
95th JUDICIAL DISTRICT

RICARDO HINOJOSA

VS.

JOSTEN'S, INC., ASHCRAFT LAW FIRM,
A PROFESSIONAL CORPORATION and
WILLIAM O. ASHCRAFT, individually

ORAL DEPOSITION OF
MS. JUDY HOWARD
NOVEMBER, 1, 2002

ORAL DEPOSITION OF MS. JUDY HOWARD, produced as a witness at the instance of the PLAINTIFF, and duly sworn, was taken in the above-styled and numbered cause on the 1st day of November, 2002, from 9:36 a.m. to 10:49 a.m., before Karen A. Wilson, CSR in and for the State of Texas, reported by machine shorthand, at the Ashcraft Law Firm, 3900 Republic Center, 325 North St. Paul, Dallas, Texas 75201, pursuant to the Texas Rules of Civil Procedure.

APPEARANCES

FOR THE PLAINTIFF:

LAW OFFICES OF JOHN E. WALL, JR.
5728 Prospect, Suite 2001
Dallas, Texas 75208
BY: MR. JOHN E. WALL, JR.
(214) 887-0100

FOR THE DEFENDANTS:

ASHCRAFT LAW FIRM
3900 Republic Center
325 North St. Paul
Dallas, Texas 75201
BY: WILLIAM O. ASHCRAFT
(214) 987-0660

ALSO PRESENT:

Mr. Dave Bauereis

INDEX

PAGE

Appearances 2

MS. JUDY HOWARD

Examination by Mr. Wall 5
Examination by Mr. Ashcraft 56
Further Examination by Mr. Wall 58
Further Examination by Mr. Ashcraft 61
Further Examination by Mr. Wall 63

Signature and Changes 64

Reporter's Certificate 66

MS. JUDY HOWARD,
having been first duly sworn, testified as follows:

PROCEEDINGS

MR. WALL: For the record, Counsel, who's your corporate representative?

MR. ASHCRAFT: The corporate representative for the deposition today is Dave Bauereis.

MR. WALL: And will he be your corporate representative at time of trial?

MR. ASHCRAFT: We'll take that matter up when we get to trial.

MR. WALL: Okay, And we had sought to have Mr, Bauereis change positions, since he's here today with

Ms. Howard, so that we could have the witnesses not be able to overhear one another's testimony so -- and you will not agree to that.

MR. ASHCRAFT: I've indicated that we would like for the depositions to be taken in the order that they were noticed, and Ms. Howard was noticed for 9:00. She has been present for deposition since 9:00.

MR. WALL: Yeah

MR. ASHCRAFT: She has been present and available for deposition since 9:00. I believe counsel arrived here not till 9:30 today,

MR. WALL: Well, actually it was about 9:20, but problem was -- and we waited for 10 minutes for y'all, but problem was is that I got Into the wrong parking slot downstairs but

MR. ASHCRAFT: Well, set the matter straight, we received a call from counsel's office that he would be late We understood he was going to be late.

MR. WALL: Yeah.

MR. ASHCRAFT: And--

MR. WALL: And I apologized far that. You know, I accommodated you when we did that for Mr. Hinojosa as well.

MR. ASHCRAFT: That's fine, We don't mind you being late, Counsel, but the point being we walked in here

within five minutes after we were informed that Mr. Wall was here ready to go,

EXAMINATION

BY MR. WALL:

Q. Ma'am, will you state your full name for --

MR. WALL: Do you want to swear her in?

THE COURT REPORTER: She is.

Q. (BY MR. WALL) Do you understand you're under oath, ma'am?

A. Yes, sir.

Q, And what's your full name?

A. Judy Melinda Howard.

Q. And where are you employed?
A. Josten's.

Q. What's your job duties there?

A. I'm sorry, My duties or my job title?

Q. Job duties.

A. Job duties.

Q. Or title, however you want to call it.

A. I'm HR coordinator,

Q. And what does an HR coordinator do?

A. I manage the employee injury files. I coordinate benefits, health benefits, life, short-term ability, vision, dental -- on employees' files. That's called -- or People Soft. It's a software that we use. I make those changes. I conduct our ESM survey.

Q. What is an ESM survey?

A. It's an employee motivation survey. We do that quarterly.

Q. Okay. Does that pretty well summarize all your duties?

A. I think so. I'm probably leaving some out.

Q. Why did you fire Mr. Hinojosa?

A. He had exhausted his benefits. Well, he -- he had returned to work under the restricted duties the doctor had given him and he was still complaining of hurting.

Q. And that's why you fired him?

A. He was unable to perform any of the duties that we had.

Q. Is that why you fired him?

A. Actually I didn't fire him.

Q. Who did?

A. Terry Jones.

Q. How do you spell that name?

A. T-E-R-R-Y J-0-N-E-S.

Q. And who is she?

A. HR supervisor.

Q, Is she still employed there?

A. Yes, she is.

Q. Were you involved in the decision to terminate Mr. Hinolosa's employment?

A. No.

Q. So how do you know the reasons that he was fired?

A. I overheard them.

Q. From whom?

A. Terry Jones and Dave Bauereis.

Q. How did you overhear it?

A. I was in the room

Q. You were in the room?

A. Yes.

Q. And they did the speaking?

A. Yes.

Q. Who did the speaking?

A. Terry Jones.

Q. And those are the reasons that she gave Mr. Hinojosa?

A. Yes.

Q. And she said those out loud in your presence --

A. Yes.

Q. --to Mr. Hinojosa?

A. Yes.

Q. And when was Mr. Hinojosa released to return to restricted activity?

A. September the 11th, 2000.

Q. And how do you know he was?

A. I spoke with the doctor.

Q. And who was the doctor?

A. Dr. Finnegan. Actually I spoke with the doctor's nurse.

Q. And you did that yourself?

A. Yes, sir.

Q. And you did that on September the 11th of 2000?

A. No. I did that September the -- September the 7th I spoke with the nurse. And after I left that day the nurse called me back, left a voice mail message that ha could return to the job that we had discussed, I had read the job description to her, for four hours a day beginning September the 11th.

Q. Had you provided them a written job description?

A. Yes.

Q. And you did that before your conversation with the nurse on the 7th of September?

A. Yes.

Q. And what have you reviewed to prepare for your deposition?

A. The employee injury file.

Q. Anything else?

A. Ricardo's affidavit, a couple affidavits and his statement.

Q. His statement? A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. What statement?

A. The statement that we took on September the 14th.

Q. Who took the statement?

A. Mr. Bill Ashcraft.

Q. The lawyer seated to your right?

A. That's correct.

Q. And what kind of statement is that?

A. It's a statement.

MR. ASHCRAFT: Objection, vague and ambiguous.

Q. (BY MR. WALL) You described it as a statement, didn't you, ma'am?

A. Yes.

Q. Is it a tape-recorded statement or a written statement?

A. It's a written.

Q. And whose writing is it?

A. Its actually typed.

Q. Who typed it?

A. I can't tell you. Someone from Mr. Ashcraft's office

Q. Did Mr. Hinojosa sign that statement?

A. Yes, sir.

Q. What's the date of that statement?

A. September the 14th, 2000.

Q. And did you review that statement to refresh your recollection?

A. Yes, I did.

Q. Did you review it todav?

A. Yesterday.

Q. And the affidavit and the employee benefit file and things like that, when did you review them?

A. This morning.

Q. Here in the attorney's office?

A. Yes.

Q. Now, haw did you transmit or how did you provide a written job description to Dr. Finnegan's nurse?

A. Ricardo took it to his previous visit with him.

Q. Okay. And why did he take it to the visit with him?

A. He had been asking to return to work and that was the job -- I had spoken with Judy Deluna. That's the job that she had that she thought he might be able to perform. Of course, that would be up to the doctor, so I sent the job description with him.

Q. When did you meet with Mr. Hinojosa to provide him the job description?

A. I didn't meet with him. I actually left the form with him before his visit I'm trying to remember. August the 28th or August the 29th was his visit with Dr. Finnegan, so j ust previous to that I had left it at the receptionist area along with authorization farms for that visit.

Q. Authorization forms for what?

A. For the visit itself.

Q. And you left it at the front desk?

A. Yes. I sealed it up in an envelope, put his name on it and left it for him to pick up.

Q. The statement of Mr. Hinojosa, is that part of his personnel file?

A. No.

Q. Is it part of his employee injury benefit file?

A. Yes.

Q. Now, you're saying that Mr. Hinojosa spoke to you and indicated he wanted to return to work?

A. Yes, sir.

Q. At what position?

A. He was saying any light duty. He just wanted to return to work.

Q. What sort of positions were available that he could perform?

A. At that time that was the only position that we had. And I wasn't even certain that he would be able to perform that That's the reason I sent the job description with him.

MR. WALL: Object to the nonresponsive portion.

Q. (BY MR. WALL) What jobs were available that Mr, Hinojosa by reason of his experience and tenure with the company were available that he could perform?

A. As far as I know, that was the only one.

Q. What did you do to try to determine what was available job-wise?

A. I checked with supervisors.

Q. Who?

A. Judy Deluna. I don't remember if I checked with Theotis Watts or not, but I know I did with Judy Deluna.

Q. Theotis Watts?

A. Yes.

Q. W-A-T-T-S?

A. That's correct

Q. Has Mr. Watts ever had any charges of sexual harassment levied against him?

A. I don't know.

Q. is that T-H-E-O-T-I-S?

A. That's correct.

Q. And Ms. Deluna is D-E-L-U-N-A? A. Correct.

Q. Now, was it required for Mr. Hinojosa to have an authorization to go to the doctor each time he was going to go to visit?

A. Yes.

Q. And you had asked him or you had provided him this job description of what position?

A. Layout.

Q. And what does layout involve?

A. Taking -- a tray of rings would be brought to him. He would take it out and on a little pad would have the size at the top. He would use a mandrel, size the ring and lay it under whatever size the ring is.

Q. Okay.

A. Then he would take a ring, a shop copy, he would look at that, check the description of the ring, the bezel, the quality, the shanks. And then if it matched the description for that -- for that ring, then he puts the ring inside what we call a convelope or an envelope and then he would take that and put it in what we call a bucket.

Q. What height was this work?

A. He sat at a desk.

Q. At desk height?

A. Yes.

Q. Did the job require these layout trays to be stacked upon -- or on top of one another

A. Not to my knowledge.

Q. Would that be normally for the layout trays to be stacked one on top of another at his desk?

A. Not to my knowledge.

Q. Wouldn't it be the normal practice there to have everything desk height and nothing over a foot or so above the desk height?

A. I'm not sure what you're asking me,

Q. Well, the height of his work area, would it be what we call bench height?

A. Bench height, Table height.

Q. Table height?

A. Or desk, uh-huh.

Q. And what would be the maximum height that these boxes or these layout trays would be stacked?

A. I'm not sure that they're even stacked. If they are, they probably wouldn't be more than two or three.

Q. So it would be very abnormal then, I take it from your description, for these boxes or these layout trays to be stacked one on top of another?

A. To be honest, I'm not certain It might be two or three stacked on top of each other. I don't know.

Q. Do you know any other way?

A. One at a time.

Q. Okay.

A. And I'm sure that's how he worked was one at a time with one.

Q. What did you understand his restrictions, his physical restrictions to be?

MR. ASHCRAFT: Objection, vague and ambiguous.

THE WITNESS: Work four hours a day. He could sit, package rings. I believe that's it.

Q. (BY MR. WALL) Any restriction on overhead reaching or moving?

A. No.

Q. None?

A. No. Not that I recall.

Q. Did you do this to accommodate him, find this job for him?

A. Yes.

Q. And that was because you regarded him as having an impairment or disability?

A. That was the -- because of the restrictions that the doctor gave is the reason

Q. Okay, And the restrictions were indicative to you of an impairment or disability?

A. I can't say a disability. I don't know what the legal term is of that.

Q. Well, I'm not asking you for a legal definition. I mean --

A. All I -- we followed the restrictions that the doctor gave us. And she said he could do this job, so that's the reason we put him in that position.

Q. Did you regard him as being disabled?

A. I can't answer that.

Q. I mean, what did you think about his condition?

A. Just -- I was just following the restrictions that the doctor gave.

Q. I know, but you were the person who was reviewing his medical, correct?

A. Yes.

Q. And you were the one that was getting copies of his medical records, correct?

A. Correct.

Q. And in reviewing those medical records, did you consider him to have a disability?

A. I couldn't say a disability. I didn't regard him that he did or he didn't. I was just following the restrictions.

Q. Okay. Would you regard a blind person as being disabled?

A. To some extent. I don't know that I would say disabled. There's a lot of blind people that hold jobs.

Q. Would you regard a person who had amputated feet as being disabled?

A. Probably. I mean, I don't know. I can't say what I would consider disabled.

Q. Would you regard a person who had an amputated arm as being disabled?

A. I can't answer that.

Q. Would you regard a person that had a brain tumor as being disabled?

A. I can't answer that either.

Q. Would you regard a paraplegic as being disabled?

A. I wouldn't answer-- couldn't answer that.

Q. Would you regard a quadriplegic as being disabled?

A. I can't answer it.

Q. Now, when Mr. Hinojosa carne to your facility, I guess it was sometime prior to August the 28th, to obtain whatever information you had for him to take to the doctor?

A. Yes.

Q. Did you speak to him that day?

A. No.

Q. When is the last time before August the 28th that you had spoken to Mr. Hinojosa?

A. It's been too long ago. I can't remember.

Q. When is the first time vou're contending that Mr. Hinojosa had communicated with you that he was interested in returning to work in some capacity, whether restrict or not?

A. He called very frequently, maybe not once a week, but at least a couple of times a month. And almost every time I spoke with him, whether I initiated the call or if he did, he was constantly asking if he could come back to work, if there was a light duty job that he could do.

Q. Okay. And since he was constantly doing this, when is the first time that you made or initiated any contact or any inquiry with his physician to see what he could do physically?

A. I don't recall

Q. Now, when is the first time or how long before August the 28th of 2000 are you saying that Mr. Hinojosa was contacting your organization to see if he could return to work in some restricted capacity?

A. Would you mind repeating that?

Q. Not at all. When is the first time, since you said Mr. Hinojosa, in light of your answer, that he was constantly calling to see if he could return to work in some restricted capacity, when is the first time you recall him having contacted you or your organization about returning to work?

A. I can't give a date, but it wasn't long after his surgery he was asking to came back.

Q. Okay. And was he speaking with you?

A. Yes.

Q. And all of the contact would have been with you?

A. Yes.

Q. And is there anyone else that you know of at your organization who indicates that they spoke with Mr. Hinojosa about returning to work in same capacity?

A. Before or after his surgery?

Q. After.

A. After. Only me that I'm aware of.

Q. And the envelope that had the job description in it, did you tell Mr. Hinojosa or are you contending that you told Mr. Hinojosa that that was going to be a written job description in this envelope for him to provide to the doctor?

A. Yes.

Q. When Mr. Hinojosa was first contacting your organization about returning to work in some restricted capacity, did you make any searches then to see if there was work available that he could perform?

A. Not at that point When he was -- when he first started mentioning it, he was going to physical therapy, and I told him he would have to wait until the doctor would release him at some point or mention some light duty work.

Q. Well, would his physical therapy interfere with working four hours a day?

A. No.

Q. So if all you were providing him was a four-hour-a-day job, why wasn't a search made sooner for work that he could perform?

A. I can't say that it wasn't for sure. I just don't remember doing that.

Q. Now, were you in a hurry to get Mr. Hinojosa released to work?

A. No.

Q. Why were you calling the doctor then about releasing Mr. Hinojasa to work?

MR. ASHCRAFT: Objection, asked and answered.

THE WITNESS: Why was I calling?

Q. (BY MR. WALL) Yes, ma'am.

A. Because he asked me. He kept asking me. He said he would like to return to work.

Q. Why were you calling the doctor to get a release?

MR. ASHCRAFT: Objection, asked and answered.

Q. (BY MR. WALL) Rather than just wait for it in the mail?

MR. ASHCRAFT: Objection, asked and answered.

THE WITNESS: He was asking for a release to return to work.

Q. (BY MR. WALL) And so why didn't you just wait for the release to come in the mail?

A. Sometimes it was a month or two months later and he was asking to return to work.

Q. So it was so you could help him out?

A. Exactly.

Q. And when Mr. Hinojosa first came back to work, what job did he perform?

A. Layout.

Q. Who was his supervisor?

A. Judy Deluna.

Q. And when did he first return to work?

A. September the 11th, 2000.

Q. And what kind of work did he do that day?

A. Layout.

Q. And do you know that personally?

A. Yes.

Q. You observed him doing it?

A. No. I spoke with his supervisor. His supervisor informed me that that's what he did.

Q. And haw did he perform?

A. l don't know.

Q. Now, did he work a full four hours on September the 11th?

A. To my knowledge, yes.

Q. And did he work a full four hours on September the 12th?

A. Yes. To my knowledge, yes.

Q. And did he work a full four hours on September the 13th?

A. No,

Q. Why not?

A. I had spoken with his supervisor on the 12th and she -- asked how he was doing, and she said he was complaining constantly with his arm hurting to other co-workers.

Q. Did he complain to Ms. Deluna?

A. I don't recall

Q. Now, did you talk to any of these co-workers to see if that really occurred?

A. No. I didn't.

Q. Did you ask her what it was about the job that these people were allegedly saying was causing him pain or whatever it was,--

A. No, I didn't.

Q. -- his complaints?

A. No. She just said that he was hurting.

Q. Did she say that he had reported that to her?

A. I don't recall.

Q. Did he report to work at all on the 13th?

A. Yes, sir.

Q. And what happened when he came to work on that day?

A. After talking with his supervisor, I paged him and asked him to come to my office. Asked him if the job was hurting him. And he said, Yes, he was hurting. When he would go home in the afternoon, his shoulder was swollen and pain was radiating down his arm. And I explained to him that I didn't want hire to hurt or rein -- to hurt himself, so I --

Q. Or reinjure himself?

A. Well, hurt him. I just didn't want him to be in any pain. I don't think I said reinjure. I said we didn't want him to be in pain or hurting.

Q. Didn't you just say reinjure?

A. I started to, but I didn't mean that, because I didn't tell him that. I just told him we didn't want him to be hurting.

Q. Okay. And what did he say, if anything?

A. He said he was hurting. He said it even hurt his arm just to swing it as he walked.

Q. And did he say he did not want to work?

A. He didn't say-- I don't recall if he said he didn't want to work or not. I just told him we didn't want him hurting and I asked him to go ahead and leave and that we would talk with him the next day.

Q. And so it was your decision to send him home on the 13th of September of 2000?

A. It was, but I had also talked with Dave Bauereis before asking him to come to my office.

Q. When did you speak with Mr, Bauereis?

A. Earlier that same day in the morning.
Q. On the 13th?

A. Yes.

Q. And what did you and Mr. Bauerels discuss?

A. I just explained to him that Judy Deluna had said that Ricardo was complaining of hurting.

Q. And what did he say?

A. We agreed that I needed to ask him if he was hurting and if he said, yes, that we should ask him to go home.

Q. Do you believe that all of your employees work without pain?

A. I can't answer that.

Q. Do you believe that you have employees that do work with pain?

A. Not to my knowledge.

Q. No one?

A. I don't know.

Q. Well, why if he were in pain would that mean that you did not want him working if you don't recall what his position was with regard to working in pain?

MR. ASHCRAFT: Objection, asked and answered.

THE WITNESS: I'm not sure what you just asked me.

Q. (BY MR. WALL) Well, you remember you said that you don't recall whether Mr. Hinojosa was unwilling to work in pain, true?

MR. ASHCRAFT: Objection, mischaracterizes former testimony.

Q. (BY MR, WALL) Was Mr. Hinojosa willing to work with pain?

A. I don't know if he was or not.

Q. Did you ask him?

A. I don't recall.

Q. Do you think you did?

A. I don't recall.

Q. Would that seem like a logical thing to ask a person who was in pain?

A. When he said he was hurting, he went home with his arm hurting so bad and his shoulder was swollen. I wouldn't want any employee to be in that much pain.

Q. Now, Mr, Bauereis was in agreement with you to send Mr. Hinojosa home on the 13th?

A. Yes, sir.

MR. ASHCRAFT: Objection. Objection. Mischaracterizes former testimony.

Q. (BY MR. WALL) Wasn't he in agreement with you?

A. Yes.

Q. Didn't you say that earlier?

A. Yes.

Q. Do you think that's a mischaracterization what I just asked you?

A. Could be.

Q. How?

A. Just the way it was worded,

Q. What about the wording would constitute a mischaracterization?

A. Sounds like maybe he -- it was Mr. Bauereis' -- that he was suggesting and implying and trying to get him -- Ricardo out and that was not true.

Q. What about my question connoted that to you?

A. Would you answer -- ask the question again for me, please?

Q. What about the verbiage that I used carried that connotation with you?

A. I don't know.

Q. How long did this discussion with Mr. Bauereis last that preceded Mr, Hinojosa being paged to come to the office?

A. I don't recall. I would say approximately -- I don't know, three, four, five minutes. I can't say for certain.

Q. Did you make any notes about that conversation with Mr. Bauereis?

A. I don't recall.

Q. Did you make any notes about your conversation with Mr, Hinojosa?

A. Yes.

Q. What did you do with them?

A. They're in the employee injury file.

Q. The employee injury benefit file?

A. Yes.

Q. Now, did you show those notes to Mr. Hinojosa?

A. Not that I recall.

Q. Did you make them while you were speaking to him?

CAUSE NO. 01-02717-D

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
95th JUDICIAL DISTRICT

RICARDO HINOJOSA

VS.

JOSTEN'S, INC., ASHCRAFT LAW FIRM,
A PROFESSIONAL CORPORATION and
WILLIAM O. ASHCRAFT, individually

ORAL DEPOSITION OF
MR. DAVID BAUEREIS
NOVEMBER, 1, 2002

ORAL DEPOSITION OF MR. DAVID BAUEREIS, produced as witness at the instance of the PLAINTIFF, and duly sworn, was taken in the above-styled and numbered cause on the 1st day of November, 2002, from 11:06 a.m. to 11:34 a.m., before Karen A. Wilson, CSR in and for the State Texas, reported by machine shorthand, at the Ashcraft Law Firm, 3900 Republic Center, 325 North St. Paul, Dallas, Texas 75201, pursuant to the Texas Rules of Civil Procedure.

APPEARANCES

FOR THE PLAINTIFF:

LAW OFFICES OF JOHN E. WALL, JR.
5728 Prospect, Suite 2001
Dallas, Texas 75208
BY: MR. JOHN E. WALL, JR.
(214) 887-0100

FOR THE DEFENDANTS:

ASHCRAFT LAW FIRM
3900 Republic Center
325 North St. Paul
Dallas, Texas 75201
BY: WILLIAM O. ASHCRAFT
(214) 987-0660

INDEX

PAGE

Appearances 2

MR. DAVID BAUEREIS

Examination by Mr. Wall 4

Signature and Changes 26

Reporter's Certificate 28

MR. DAVID BAUEREIS,
having been first duly sworn, testified as follows

EXAMINATION
BY MR. WALL:

Q. Sir, will you state your full name for the Court and jury, please?

A. David Lawrence Bauereis.

Q. Mr. Bauereis, what's your date of birth?

A. 5-12-53.

Q. And where do you live?

A. In Euless.

Q. What's the address?

A. 1311 Oak Timber Drive.

Q. T-I-M-B-E-R?

A. Correct.

Q. And that's in Euless?

A. Uh -huh .

Q. Any plans on moving?

A. No.

Q. How long have you lived. there?

A. Five years.

Q. Married?

A. Yes.

Q. Children?

A. Yes.

Q. How many?

A. Four between us.

Q. Oh.

A. Excuse me?

Q. Hers, yours and ours --

A. Yeah.

Q. --kind of thing?

A. Yeah.

Q. All right. What's your social security number?

A. 511-58-9140.

Q. Where are you from?

A. All over. My dad was in the service.

Q. What branch?

A. Army.

Q. 511 --

A. I think that was probably Kansas when I got it.

Q. How much education do you have, sir?

A. Undergraduate degree.

Q. Where's that from?

A. SMU.

Q. When did you graduate?

A. '78.

Q. What was your area of study?

A. Business.

Q. Do you know Craig Levering?

A. No. Don't recall.

Q. I think he would have been there about that same time. Who were your friends at SMU?

A. I lived at home at the time, so most of my friends were co-workers at that time, but I did here some friends from school.

Q. Were -

A. I haven't stayed current with any of them.

Q. Yeah. Where were you working at the time?

A. At Sterling Jewelers.

Q. Oh, really?

A. Uh-huh.

Q. Northwest Highway?

A. Uh-huh.

Q. What were you doing at Sterling?

A. Working in the warehouse, stocking the warehouse.

Q. Just across from the Black Forest Bakery?

A. That name's familiar, but I'm not positive of that.

Q. Yeah. They had a Steak and Ale over there about that same time.

A. Yeah. Yeah.

Q. Now, when did you first go to work far Josten's?

A. February '98 I believe it was.

Q. And when you hired on what was your job?

A. Human Resource Manager.

Q. What's your job title today?

A. Plant Manager.

Q. When did you graduate to Plant Manager?

A. August 2000 I believe it was.

Q. When you were Human Resource Manager, you hired on as Human Resource Manager?

A. Correct.

Q. Had you ever done any human resource work before?

A. Yes.

Q. Where?

A. For Clark American Checks.

Q. How long were you there?

A. 10 years.

Q. And where did you work before that?

A. For a very short time at an executive recruiter.

Q. So your human resource experience has been at Clark American Checks and at Josten's?

A. Yeah. In between there there was a one-year time period I was at a company called Business Interiors.

Q. Were you doing human resource work there?

A. Yes.

Q. Were you considered like a human resource generalist at Clark American?

A. Yes.

Q. And were you a generalist as well at the Business Executive -

A. Interiors.

Q. Business Interiors?

A. Yes, I was.

Q. And you were a human resource generalist, I guess, at the Business Interiors immediately before you went to work for Josten's'?

A. That's correct.

Q. Was there a break in service?

A. A very short period.

Q. Ever been fired from a job?

A. No.

Q. Ever been asked to leave?

A. I was laid off from Business Interiors.

Q. Okay. Why did you leave Clark American?

A. To move to Dallas. Clark American was in San Antonio.

Q. Okay. You hired on as a Human Resource Manager at Josten's?

A. Correct.

Q. And when you hired on, I guess, you were the person responsible for administering the terms, conditions and privileges of employment with regard to the employees?

A. Yes.

Q. What kind of a trainer is Mr. Hinojosa?

A. What kind of what?

Q. Trainer. Good? Bad?

A. I don't know.

Q. You don't know?

A. I don't know, no.

Q. Never asked anybody?

A. I don't believe so.

Q. Bid you ever ask anybody to find out what kind of trainer he was?

A. No.

Q. You're confident of that?

A. Yes.

Q. Why did you fire Mr. Hinojosa?

A. Because he wasn't able to do any of the jobs that we had available.

Q. What were those jobs?

A. There were various production jobs I'm sure available at that time including the one that he was filling for the short period of time.

Q. How did you know that he couldn't do the job?

A. Based on the complaint that he had made about hurting while performing the job.

Q. Bid e do the job despite his pain?

A. I don't know whether he did or not.

Q. Did you ever try to find --

A. He was there for two and a half days.

Q. What kind of pain?

A. Shoulder and arm pain.

Q. Do you know anything more specific than that?

A. No.

Q. And where did you hear that he was having pain doing his job?

A. Would have been from Judy Howard.

Q. The lady whose testimony we just took?

A. Yeah.

Q. Did you ask her anything more specific than that about the nature of his pain or what might have caused it?

A. I don't recall doing that. I might have, but I don't recall it.

Q. Do your employees work pain free?

A. As far as I know they do, yeah.

Q. Are you pain free every day?

A. Other than some allergies, yes.

Q. You're soon to be 50 and you're pain free?

A. Yeah.

Q. And you've done physical work in your life? A. Yeah.

Q. And you don't have any aches or pains?

A. I don't. No.

Q. Do you think your employees have aches and pains at work?

A. I don't know whether they do or not. Nobody has told me that they do.

Q. Are they permitted to take Advil or aspirin or whatever if they're having pain at work?

A. Anybody is permitted to take those.

Q. Don't you have a company nurse there?

A. No.

Q. Got a company doctor?

A. We have a doctor that we send people to that make a claim under the IBP program.

Q. Okay.

A. He's not a Josten' s employee.

Q. Right. Does this physician from time to time release people tc return to work on restricted activity?

A. Yes.

Q. And when this physician releases them to return to work on restricted activity, are they pain free?

A. I don't know whether they are or not. Q. Do you ask them?

A. No.

Q. Why not?

A. What reason would there be to ask them?

Q. Okay.

A. I'm not qualified. I'm not a doctor.

Q. Judy Deluna, did you ever talk to her about what the nature of Mr. Hinojosa's complaints were?

A. I don't believe so.

Q. Did anybody, to your knowledge, ever speak to Ms. Deluna about the nature of Mr. Hinojosa's complaints?

A. I don't know whether they have or not.

Q. Did you ever talk to Judy Deluna or have anybody talk to Judy Deluna to see whether or not Mr. Hinojosa was a goad trainer?

A. I'm not aware, no.

Q. Now, Mr. Hinojosa you know had been a supervisor for a while down in, what is it, Weslaco or South Texas?

A. In Nuevo Laredo?

Q. In Laredo, was it?

A. Uh-huh.

Q. Was he a good supervisor down there?

A. I have no idea.

Q. What is a trainer?

A. It could be very many different things. Specifically what are you asking?

Q. Do you have a job description for a trainer?

A. I don't know if we do or not.

Q. Did you ever speak to Mr. Hinojosa yourself?

A. I'm sure I've talked with Mr. Hinojosa.

Q. About his ability or inability or whatever to do the job?

A. I don't believe so.

Q. Now, September the 11th, 12th and 13th, did you ever speak to Mr. Hinojosa?

A. I don't recall if I did or not.

Q. Did you ever inquire from Mr. Hinojosa if he understood what he was signing?

A. No.

Q. You know Mr. Hinojosa's native language is Spanish, don't you?

A. Yes, I do.

Q. You know him to have a pretty thick accent, don't you?

A. Yes, I do.

Q. Didn't he speak Spanish most the time at the workplace?

A. I don't know.

Q. Would you ever have a conversation with him and have difficulty understanding him?

A. I may have. I don't recall whether I did or not.

Q. Do you speak any foreign languages?

A. No.

Q. Why did you need a statement from Mr. Hinojosa?

A. I was trying to -- his injury had occurred sometime in the past and he had been off work for quiet some time so I was trying to determine what his status was and what he was and was not capable of doing.

Q. Why didn't you just have somebody ask him that?

A. I did do that.

Q. Other than a lawyer who called himself counsel.

A. That was the way I determined I wanted to do it.

Q. Whenever you discuss work restrictions or inability or ability to do work as a human resource generalist for all these years did you always have a lawyer do that for you?

A. No. These were unusual circumstances, because his injury had occurred so long ago and he had soon so many doctors and we had brought him back and he was unable to do a light duty job, there were so many special circumstances that I determined that was going to be the best course.

Q. And so you wanted a lawyer to do it?

A. Yes.

Q. Why didn't you just talk to Mr. Hinojosa first before you sent the lawyer to take the statement?

A. I told you. That was the way I determined. I wanted to handle it.

Q. I understand. Just because of the length --

A. Yeah.

Q. -- and the number of physicians?

A. (Witness nods).

Q. Is that a yes?

A. That's the way I answered it, yes.

Q. Okay. Do you do that whenever an employee has been out for an extended period of time and has seen a number of doctors?

A. There isn't any normal. I look at each one on a case-by-case basis.

Q. Have you ever had a person who has had a non-work related illness or injury that's been away from work for an expended period of time?

A. Probably. I don't recall.

Q. Did you have a lawyer talk to him when they came --

A. I just said I don't recall, so I don't know if would have or not.

Q. You can't remember anybody that might have beer afflicted or a victim of cancer?

A. I'll say again, I do not recall.

Q. Okay. Now, did you -- didn't you tell Mr. Hinojosa that you didn't think they were going to fire him?

A. I don't recall having that conversation, no. Q. Do you deny it?

A. Yes.

Q. Whose decision was it to fire Mr. Hinojosa?

A. It would be my decision.

Q. Yours and yours alone? A. Yes.

Q. Did you have any input from Ms. Jones?

A. I rarely make those types of decisions without seeking advice, so probably I did.

Q. Anybody else?

A. I don't recall whether there was or not.

Q. Did y'all have like a meeting where you talked about Mr. Hinojosa?

A. Probably.

Q. Do you remember it?

A. No.

Q. Do you remember who was in attendance?

A. If I remembered the meeting, I would remember who was in attendance.

Q. Okay. I mean, correct me if I'm wrong, but -well, strike that. Human resource generalists are known to document, aren't they?

A. I that what you know them to do? I don't know whether they are or not.

Q. That's not part of your organizational behavior and training, curriculum in business school?

A. I didn't go to school to become an HR generalist an wasn't an HR generalist at the time Mr. Hinojosa was fired.

Q. Right. But you had been for years.

A. Yes.

Q. And did you-all have a meeting -- well, did you make any notes about this decision process?

A. No.

Q. Had you ever had Mr. Ashcraft interview anybody before Mr. Hinojosa was interviewed by him?

A. In connection with Mr. Hinojosa's case?

Q. Anyone other than Mr. Hinojosa.

MR. ASHCRAFT: Objection, vague.

THE WITNESS: I don't understand the question.

Q. (BY MR. WALL) Had Mr. Ashcraft performed the

* * *

AFFIDAVIT OF RICARDO HINOJOSA

STATE OF TEXAS §
§
COUNTY OF DENTON §

BEFORE ME, the undersigned authority, personally appeared RICARDO HINOJOSA, known to me to be the person whose name is subscribed hereto, and first being by me duly sworn according to law, upon his oath deposed and stated as follows:

1. "My name is Ricardo Hinojosa. I am over twenty-one (21) years of age and I am under no disability to give this Affidavit which is based on my personal. knowledge that the facts herein recited are true.

2. I was hired by Jostens, Inc. ("Jostens") on September 23, 1985. In April 1997, I was working as a Diamond Setter for Jostens. In my job as a Diamond Setter, I had used a certain machine since 1989. I don't recall the name of the machine, but it is a piece that you hold in your hand and you use it to push prongs or metal against the stone. Because it runs at a speed of 300-1000 strokes a minute, it vibrates alot. This vibration runs through the setter's hand, up into the setter's arm and shoulder. I believe there is a pretty good chance that the use of this machine is what caused the injury to my right shoulder which I reported to Jostens in the attached Employee Injury Report that I signed on April 23, 1997. As I stated in that report, the date of my injury was April 2, 1997 because that is when I first felt pain in my right shoulder, but I believe that the injury to my shoulder which occurred on April

2, 1997 was caused by my repeated use of the machine since 1989.

3. Since reporting the injury in April 1997, I have had continuous problems with pain in my right shoulder, the right side of my neck, my right arm, my right forearm and the right, side of my back. In January of 2000, I underwent radial tunnel release surgery because of the pain in my right arm and forearm.

4. I am certain that all of the health problems and pain I have experienced since April 2, 1997 were caused by the injury I reported in April 1997. I have not had any injuries of any kind since April 1997 nor have I had any health problems other than those that were caused by the injury I reported in April 1997.

5. Since the date of my injury in April 1997, I have not been able to perform my duties as a Diamond Setter and I am still unable to work today. On Monday and Tuesday of this week, I tried to work in a temporary restricted duty position in which I did layouts, which called for me to match rings with check copies and put the rings in a box. I was unable to put the rings in boxes because I had to raise my arm to do so and this caused a lot of pain to my right shoulder, I am certain that this pain is caused by the injury I reported in 1997.

6. I have consulted with my personal family physician, Dr. Brent Gorman, about the problem with m shoulder and he is trying to refer my to a neurologist and have it paid for by health insurance.

7. In conclusion, all the health problems and pain I have were caused by the job related injury I reported in April 1997. Otherwise, I do not have any other health problems."

FURTHER AFFIANT SAYETH NOT.

/s/
Ricardo Hinojosa

SUBSCRIBED AND SWORN TO BEFORE ME on this 14th day of September 2000, to certify which witness my hand and seal office.

/s/
Notary Public in and for the State of Texas

Printed Name of Notary Public,

9-17-2003
My Commission Expires:

FILED
OCT 12 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-74

In the Supreme Court of the United States

RICARDO HINOJOSA,

PETITIONER,

v.

JOSTENS, INC.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

William O. Ashcraft, Esq.
Counsel of Record
S. Lynn Blakeman, Esq.
ASHCRAFT LAW FIRM
3900 Republic Center
325 North St. Paul Street
Dallas, Texas 75201
Telephone: (214) 987-0660

QUESTIONS PRESENTED

(1) Whether the Fifth Circuit erred in holding, consistent with every other court of appeals that has considered the question, that in order to establish a prima facie case that an employer regarded a plaintiff as disabled under the ADA, the plaintiff must produce some evidence that his employer mistakenly believed he had a physical impairment or non-limiting impairment that substantially limited one or more major life activities.

(2) Whether the Fifth Circuit correctly determined that when Petitioner was discharged he was not entitled under ERISA to begin receiving benefits under his employee benefit plan for his injury.

(3) Whether the Fifth Circuit correctly determined that Petitioner's failure to produce any evidence demonstrating that his employer was acting as a plan administrator rather than an employer is fatal to his breach of fiduciary claim under ERISA.

RULE 29.6 STATEMENT

Visant Holding Corporation is the parent company of Jostens, Inc., which is a wholly owned subsidiary. No publicly held company owns 10 percent or more of Jostens, Inc.'s stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 3

Statement of Facts 3

Proceedings Below 11

REASONS FOR DENYING THE WRIT 14

I. THE PETITION IDENTIFIES NO CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER COURT 16

II. PETITIONER'S CLAIMS FOR DISCRIMINATORY DISCHARGE AND BREACH OF FIDUCIARY DUTY UNDER ERISA DO NOT WARRANT THIS COURT'S REVIEW 29

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Buskirk v. Apollo Metals,
307 F.3d 160 (3d Cir. 2002) 18, 21, 27

Henderson v. Ardco, Inc.,
247 F.3d 645 (6th Cir. 2001) 18, 21, 22, 26

Johnson v. Paradise Valley Unified School District,
251 F.3d 1222 (9th Cir. 2001) 19, 23, 24, 27

McInnis v. Alamo Community College District,
207 F.3d 276 (5th Cir. 2000) 14, 28

McKenzie v. Dovala,
242 F.3d 967 (10th Cir. 2001) 19, 23, 27

Ollie v. Titan Tire Corp.,
336 F.3d 680 (8th Cir. 2003) 19, 23, 26, 27

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 14, 17, 18

Riemer v. Illinois Department of Transportation,
148 F.3d 800 (7th Cir. 1998) 19, 21, 27

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) 17, 20

Taylor v. Pathmark Stores, Inc.,
177 F.3d 180 (3d Cir. 1999) 18, 20, 25, 26

TABLE OF AUTHORITIES–Continued

Page(s)

STATUTES AND REGULATIONS

42 U.S.C. § 12102(2)(C) 16

29 C.F.R. § 1630.2(g)(3) 16
29 C.F.R. § 1630.2(h)(1) 16
29 C.F.R. § 1630.2(j)(1)(ii), ... 28
29 C.F.R. § 1630.2(j)(3)(i) 1, 28
29 C.F.R. § 1630.2(j)(3)(ii)(A)-(C) 1, 28
29 C.F.R. § 1630.2(*l*)(1) 1, 16
29 C.F.R. § 1630.2(*l*)(3) 16

OTHER AUTHORITY

Sup. Ct. R. 10(a) 29
Sup. Ct. R. 10(c) 29

REGULATIONS INVOLVED

29 C.F.R. § 1630.2(*l*)(1)

Is regarded as having such an impairment means:

(1) Has a physical ... impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation ....

29 C.F.R. § 1630.2(j)(3)(i), (ii)(A)-(C)

With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the [nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment], the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the

individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

STATEMENT OF THE CASE

Statement of Facts

Jostens, Inc. ("Jostens") is a leading producer of achievement recognition and affiliation products, including yearbooks, class rings and other graduation products, school photography, and achievement awards. R. 705: 197. Ricardo Hinojosa ("Hinojosa"), who was employed with Jostens from September 23, 1985 until September 15, 2002, worked as a Diamond Setter at Jostens' facility in Denton, Texas, which manufactures high school and college class rings, military rings, and sports recognition rings. R. 705: 197, 182. As a Diamond Setter, which is classified by Jostens as a precision hand skill position, Hinojosa was required to set diamonds and other types of stones into the different ring designs manufactured by Jostens, remove the stones from rings that needed rework, and perform the necessary repairs. R. 705: 200, 230-31. To accomplish these essential functions of the Diamond Setter position, Hinojosa used motorized and non-motorized tools, such as a caliper, hammer, graver max, and hand-held drill. R. 705: 200, 230-31.

On April 23, 1997, while working as a Diamond Setter, Hinojosa submitted an Employee Injury Report, notifying Jostens of an injury to his right shoulder that he had sustained on April 2, 1997. R. 705: 182, 187, 193. According to Hinojosa, the injury occurred while he was using a hammer to remove a stone from a ring. R. 705: 182. Hinojosa first sought medical treatment in February 1999 from Paul Barrus, D.O., who diagnosed Hinojosa as having a right shoulder strain with tendonitis of the biceps. R. 705: 267. Because of Hinojosa's increased shoulder pain, John Kristoferson, M.D., an orthopedist who began treating Hinojosa in March 1999, took him off work effective March 22, 1999. R. 705: 275-76. Hinojosa ceased active employment with Jostens on March 22, 1999 and was placed

on medical leave. R. 705: 38, 183, 276. Hinojosa briefly returned to restricted duty on May 3, 1999 but could not work and was therefore put back on medical leave on May 11, 1999. R. 705: 183-84.

In June 1999, Maureen Finnegan, M.D. diagnosed Hinojosa with impingement of the right shoulder; however, subsequent diagnostic tests revealed entrapment of the radial nerve in Hinojosa's right arm. R. 705: 293-94, 304-12. Kimberly Mezera, M.D., an orthopedic surgeon, performed a radial tunnel release on Hinojosa's right forearm on January 13, 2000. R. 705: 318-19. Hinojosa underwent post-surgical physical therapy for several months on his right arm and shoulder. R. 705: 336-46. Although the problems with his right forearm resolved, Hinojosa continued to complain of pain and functional limitation in his right shoulder. R. 705: 336-46. Dr. Mezera referred Hinojosa back in June 2000 to Dr. Finnegan for further treatment of his right shoulder. R. 705: 328.

Hinojosa inquired in mid-August 2000 about the possibility of returning to light duty work at Jostens. R. 705: 115-16. In response, Judy Howard ("Howard"), Human Resource Assistant for Jostens, reviewed the jobs that were available then and conferred with Hinojosa's supervisor, Judy DeLuna ("DeLuna"), about a light duty position for Hinojosa. R. 705: 115-17. Howard located a temporary restricted duty position as a Layout Clerk. *Id.*

The Diamond Setter job that Hinojosa had previously performed is not a light duty position. R. 705: 200. The Layout Clerk position, which is the lightest job at the Denton plant, was the only position available at Jostens with duties that were within physical limitations. R. 705: 116-17, 138, 155, 177, 200, 202. Howard gave Hinojosa a job description for the Layout Clerk position to take to his August 29, 2000 doctor's appointment to obtain Dr.

Finnegan's opinion about whether Hinojosa could perform the job. R. 705: 113, 115-16, 118, 122.

Dr. Finnegan examined Hinojosa on August 29, 2000 for persistent aching in his shoulder and diagnosed Hinojosa with a recurrence of the rotator cuff tendonitis in his right shoulder. R. 705: 330. On September 7, 2000, Howard was informed that, effective September 11, 2000, Dr. Finnegan released Hinojosa to restricted duty at Jostens performing the Layout Clerk job for four hours each day. R. 705: 112-14, 120, 189. Hinojosa was not released by Dr. Finnegan to return to his regular position at Jostens as a Diamond Setter. *Id.* Howard informed Hinojosa on September 8, 2000 of Dr. Finnegan's approval of Hinojosa's assignment to the Layout Clerk position. R. 705: 608.

The Layout Clerk is responsible for verifying that rings manufactured by Jostens comply with the size and specifications requested by customers in their orders. R. 705: 201, 232. The job requires the employee to record the number of newly manufactured rings laid out in a tray, size each ring, and place it in a proper column according to ring sizes listed across the top of a pad placed on a desk. R. 705: 201. When the rings have been sorted, the Layout Clerk matches each ring with its order form and checks the ring to verify that it conforms to the order. R. 705: 118, 188, 194, 201. If the ring matches the description stated on the shop copy, the Layout Clerk places the ring and the order form inside an envelope and puts the envelope in a box at his desk. *Id.*

Hinojosa returned from medical leave on September 11, 2000. R. 705: 184. Hinojosa worked in Layout for four hours each day on September 11, 2000 and September 12, 2000. R. 705: 126-27. On September 11 and 12, 2000, Howard was informed that Hinojosa complained to co-workers and to DeLuna, his supervisor, that performing Layout duties made his right arm and shoulder hurt. R. 705: 127, 156-57,

190. Shortly after Hinojosa reported for work on September 13, 2000, Howard called him to her office to obtain information about his complaints. R. 705: 128, 190. Hinojosa complained to Howard of significant pain and swelling in his shoulder and pain in his right arm and hand from performing his Layout duties. R. 705: 128-29, 131, 150-51, 158, 190. Hinojosa told Howard that when he left work on September 11 and 12, 2000, his shoulder was swollen and pain radiated down his arm. R. 705: 128. He described his condition as so severe that the slight swinging motion of his right arm while walking caused his shoulder to become sore and swollen. R. 705: 129, 151, 190. Hinojosa was unable to perform Layout duties without pain. R. 705: 128-29, 131, 150-51, 158, 190, 194.

Howard expressed her concern and told Hinojosa that Jostens did not want him to experience pain because of the work that he was performing in the Layout Clerk position. R. 705: 128-29, 131, 190. Howard understood from his complaints of extreme pain and swelling upon even slight shoulder movement that Hinojosa believed there was no way he could perform the Layout Clerk job. R. 705: 185. Howard asked Hinojosa to go home for the remainder of the day and to return the following morning to discuss his situation. R. 705: 128-29, 131, 134, 158, 190.

On September 14, 2000, Hinojosa met with Howard and William O. Ashcraft, Esq. ("Ashcraft"), counsel for Jostens. R. 705: 135-36. David Bauereis ("Bauereis"), the Administrator of the Jostens Employee Injury Benefit Plan ("Plan")[1] under which Hinojosa made a claim for and

---

[1] Jostens is a nonsubscriber to the Texas Workers' Compensation Act. R. 705: 198. In lieu of workers' compensation insurance, Jostens provides medical and wage replacement benefits, pursuant to the terms of the Plan, to employees who sustain job-related injuries. R. 705: 198, 208, 211, 213.

received medical and wage replacement benefits in connection with the job-related injury that Hinojosa reported to Jostens on April 23, 1997, had retained Ashcraft to meet with Hinojosa and obtain an Affidavit from him in connection with Hinojosa's employee injury claim. R. 705: 95-96, 135, 138-39, 173-74, 183, 198-99. The purpose of the meeting with Hinojosa and procuring his Affidavit was to obtain information about Hinojosa's job-related injury, limitations, and physical abilities. R. 705: 138-39, 173-74, 199.

Based on information that Hinojosa provided during the meeting, Ashcraft prepared an Affidavit, which was reviewed by Hinojosa before he signed it. R. 705: 138, 140, 145, 238-39. After reading the document, Hinojosa deleted one sentence and initialed his change on the Affidavit before signing it. R. 705: 145-46, 227, 238-39. Hinojosa made no other revisions to his Affidavit. *Id.* In his Affidavit, Hinojosa swore that the facts recited therein are true. R. 705: 226. Hinojosa testified that he had experienced continuous problems since April 1997 with pain in his right shoulder, arm, and forearm and admitted in his Affidavit that "[s]ince the date of my injury in April 1997, I have not been able to perform my duties as a Diamond Setter and I am still unable to work today." R. 705: 227. Hinojosa also stated in his Affidavit that when he attempted on September 11 and 12, 2000 to perform restricted duty in the Layout position, he was unable to put the rings into the boxes because this task required him to raise his arm, which caused significant right shoulder pain. *Id.*

Hinojosa reaffirmed the truth of the statements made in his Affidavit in sworn testimony that he gave on September 4, 2001 at a hearing conducted by Texas State District Judge Karen Johnson in the state court action that Hinojosa filed

against Jostens.[2] R. 705: 238-39. Hinojosa testified under oath that no misrepresentations of fact are contained in his Affidavit and that the facts stated in the Affidavit are true and correct. *Id.* When Hinojosa was asked by Jostens' counsel whether Hinojosa had "lie[d] in any way or in any way misrepresent[ed] the facts stated in this Affidavit," Hinojosa replied, "[n]o." R. 705: 238.

After Hinojosa signed his Affidavit, Howard sent him home for the remainder of the day. R. 705: 150. Howard requested that Hinojosa return the next morning on September 15, 2000 for a meeting after Bauereis, Plant Manager, had reviewed Hinojosa's Affidavit. R. 705: 150, 153. Bauereis decided during the afternoon of September 14, 2000 or the morning of September 15, 2000 to discharge Hinojosa. R. 705: 148-49. Jostens also decided to discontinue payment of medical expenses and payment of further wages to Hinojosa because the 52-week eligibility period under the Plan for receipt of benefits had expired in connection with Hinojosa's employee injury claim. R. 705: 177.

Bauereis based the decision to terminate Hinojosa on his inability to perform the essential functions of the Diamond Setter and Layout Clerk positions or any other job at Jostens that was available at that time and for which Hinojosa was qualified, the statements that Hinojosa made in his Affidavit, and Hinojosa's complaints that performing Layout Clerk duties caused severe pain. R. 705: 112, 148, 171-72, 175-77. Bauereis concluded that Hinojosa was unable to perform the Layout Clerk position because

---

[2] This case originated in Texas state court. Hinojosa initially brought a negligence lawsuit against Jostens in connection with his job-related injury and asserted claims against Ashcraft in connection with the Affidavit. R. 22, 24. The state court granted summary judgment for Jostens and Ashcraft on Hinojosa's claims. R. 317.

Hinojosa had complained that the job duties and even slight movement caused arm and shoulder pain. R. 705: 172, 177.

On September 15, 2000, Hinojosa met with Terry Jones ("Jones"), Human Resource Manager, and Howard. R. 705: 154-55. Jones informed Hinojosa that his employment was terminated effective September 15, 2000 because Hinojosa was unable to perform the Layout Clerk job or any other available position at Jostens. R. 705: 112-13, 155. However, Jostens offered to assist Hinojosa with obtaining Texas unemployment benefits. R. 806. Hinojosa admitted that he did not know what was in Jostens' "mind" when it made the decision to terminate him. R. 705: 86. However, Hinojosa recognized that Jostens made a "business decision" when it decided to terminate his employment. *Id.*

When Hinojosa was terminated, Jostens had no jobs available then that complied with the medical restrictions imposed by Dr. Finnegan, which limited Hinojosa to half-days performing Layout duties only, and that Hinojosa could perform with the physical limitations that he had reported to Jostens. R. 705: 112, 116-17, 171-72, 177, 202. Due to slow production and to the fluctuating demand for Jostens' products and its need for workers depending on the school graduation and sports calendars, Jostens did not have a job as a Trainer for Diamond Setters available in September 2000 when Dr. Finnegan released Hinojosa to light duty. R. 705: 171, 177, 197; 889. The Trainer position requires a worker to engage in more hand, wrist, arm, and shoulder movement than the Layout Clerk job. R. 887. A Trainer job was not open when Hinojosa was terminated on September 15, 2000. R. 705: 177, 202. Hinojosa incorrectly claims in his Petition that a Trainer job and two unidentified jobs were available at Jostens when he was terminated. *See* Pet., pp. 16, 19.

Jones also informed Hinojosa at the September 15, 2000 meeting that the Plan benefits were discontinued because

Hinojosa's one-year eligibility period had expired. R. 705: 112-13, 155. The Plan provides that the period for which a participant is eligible for payment of medical and wage replacement benefits commences on the date on which the employee sustained a job-related injury. R. 705: 199, 209, 211-13. The maximum time for which a participant may be eligible for Plan benefits ends 52 weeks after the date of injury. *Id.*

Under the Plan, Hinojosa's eligibility for medical and wage replacement benefits expired on April 2, 1998, which was 52 weeks after his injury occurred on April 2, 1997. R. 705: 183, 199, 209, 211-13. Although his eligibility under the Plan ended on April 2, 1998, Jostens voluntarily paid Hinojosa's medical expenses and wages until September 15, 2000. R. 705: 95-96, 112-13, 177, 183, 199. Jostens paid the total amount of $66,950.36, which consisted of $22,017.02 in medical expenses and $44,933.34 in wages, to or on behalf of Hinojosa in connection with his April 2, 1997 injury. R. 705: 183. When Hinojosa was terminated from employment on September 15, 2000, he was not eligible under the Plan for medical and/or wage replacement benefits. R. 705: 177, 183, 199.

Approximately two days after his termination on September 15, 2000, Hinojosa began self-employment as a property inspector conducting visual inspections of houses, photographing them, and completing reports. R. 705: 56-57. He has continued working as a property inspector for the past few years. R. 705: 47-48, 55. Hinojosa has also procured full-time employment in two different positions as a machine operator for a manufacturing company. R. 705: 48-49, 52. In approximately October 2001, Hinojosa commenced full-time employment with United Copper Industries, Inc. ("United Copper"), a company located in the same city as Jostens which manufactures electrical wire. R. 705: 48-49. During the first 10 months of his employment at

United Copper, Hinojosa operated a clipper machine that coils wire onto spools and lifted a maximum of 10 pounds. R. 705: 49-52. He was promoted to Skaltek machine operator in approximately August 2002. R. 705: 52-53. As a Skaltek operator, Hinojosa runs a computerized machine that spools large coils containing 250 feet of wire and lifts wooden pallets that weigh 25 pounds. R. 705: 50-54.

Proceedings Below

1. Hinojosa filed this lawsuit against his former employer, Jostens, alleging causes of action for disability discrimination under the ADA and under ERISA for discriminatory discharge and breach of fiduciary duty. On January 22, 2004, the United States District Court of the Northern District of Texas, Dallas Division ("District Court"), granted summary judgment in favor of Jostens and dismissed Hinojosa's claims with prejudice. *See* Pet. App., pp. 11a-26a.

The District Court granted summary judgment on Hinojosa's ADA claim because Hinojosa was not disabled under that the statute and therefore could not establish the required elements of a prima facie case of disability discrimination. Hinojosa did not present any evidence that his right arm impairment substantially limited him in the major life activity of performing manual tasks, working, or any cognizable major life activity alleged by Hinojosa. Although Hinojosa was unable to perform the essential functions of the Diamond Setter and Layout Clerk positions at Jostens, he was not precluded from performing a broad class of jobs. *See* Pet App., pp. 13a- 20a.

Similarly, the District Court found that Hinojosa failed to establish that he had a record of an impairment that substantially limited a major life activity. Hinojosa stated that his medical records showed that he had a record of disability under the ADA. However, Hinojosa did not

identify any summary judgment evidence that allegedly supported his assertion. *See* Pet. App., p. 20a.

The District Court also held that Hinojosa failed to raise a genuine issue of material fact about whether Jostens terminated his employment or did not place him in a Diamond Setter Trainer job because Jostens regarded Hinojosa as disabled under the ADA. Jostens' summary judgment evidence established that Hinojosa, whose doctor had restricted him to light duty work limited to four hours a day, was unable to perform his regular job as a Diamond Setter or the Layout Clerk position, which was the lightest job at the plant and which involved less hand, arm, and shoulder movement than the Trainer position. The Jostens employee who located the light duty position for Hinojosa testified that she did not believe that Hinojosa was disabled. Furthermore, the District Court found that the summary judgment evidence showed that Jostens assigned Hinojosa to the Layout Clerk position in order to comply with his medical restrictions and that Hinojosa was discharged from employment because he could not physically perform Diamond Setter or Layout Clerk duties. *See* Pet. App., pp. 20a-23a.

The District Court granted summary judgment for Jostens on Hinojosa's discriminatory discharge claim under ERISA because Hinojosa could not prove a prima facie case. Hinojosa was not eligible at the time of his termination from Jostens for medical benefits under the Plan. Since Hinojosa's eligibility for benefits had expired, the District Court reasoned that Jostens could not have terminated Hinojosa with specific intent to interfere with Plan benefits. *See* Pet. App., pp. 23a-24a.

The District Court granted summary judgment on Hinojosa's breach of fiduciary duty claim under ERISA. Hinojosa alleged that Jostens violated its duty as a fiduciary under the Plan by terminating his employment with the

alleged intent to deprive him of Plan medical benefits. The District Court determined as a matter of law that Hinojosa could not maintain his claim because Jostens acted in its capacity as an employer rather than as a fiduciary under the Plan when Jostens discharged Hinojosa. *See* Pet. App., pp. 25a-26a.

2. On appeal, in an unpublished decision filed on April 5, 2005, the Fifth Circuit held that the District Court properly rendered summary judgment for Jostens on Hinojosa's ADA and ERISA claims and affirmed the Judgment of the District Court. *See* Pet. App., pp. 1a-10a. The Fifth Circuit agreed with the District Court that Hinojosa did not raise a genuine issue of material fact regarding whether he was disabled under the ADA. As the basis for its decision, the Fifth Circuit explained that Hinojosa presented no evidence that his right arm impairment substantially limited him in a major life activity such as performing manual tasks. Although Hinojosa contended that his right arm impairment made it difficult for him to perform activities of daily living, Hinojosa did not show that his alleged impairment was permanent and that it prevented or severely restricted him from performing these tasks. *See* Pet. App., pp. 2a-4a.

The Fifth Circuit also determined that Hinojosa waived his claim that he was disabled based on a record of an impairment because Hinojosa failed to adequately brief his claim by identifying supporting summary judgment evidence and case law. However, the Fifth Circuit added that even if it reviewed Hinojosa's argument that his medical records constituted a record of disability, there was no evidence that Hinojosa had a record of a substantially limiting impairment. *See* Pet. App., pp. 4a, 9a-10a.

Like the District Court, the Fifth Circuit concluded that Hinojosa failed to raise a genuine issue of material fact about whether Jostens terminated his employment or did not place Hinojosa in a Diamond Setter Trainer job because

Jostens regarded Hinojosa as disabled under the ADA. As the basis for its decision, the Fifth Circuit explained that Jostens made permissible inquiries under the ADA regarding Hinojosa's abilities to perform the Diamond Setter and Layout Clerk positions and that Jostens assigned Hinojosa to the Layout job in order to comply with the work restrictions imposed by Hinojosa's treating doctor. The Fifth Circuit further explained that the fact that Jostens discharged Hinojosa because he was unable to perform the duties of any job available at Jostens then did not establish that Jostens perceived Hinojosa as disabled. *See* Pet. App., pp. 5a-6a.

Finally, the Fifth Circuit affirmed summary judgment on Hinojosa's claims under ERISA for discriminatory discharge and breach of fiduciary duty. The Fifth Circuit based its determination on the same reasons as the District Court. *See* Pet. App., pp. 6a-8a. Judgment was entered for Jostens on May 4, 2005.

REASONS FOR DENYING THE WRIT

Though Petitioner's asserted bases for seeking the writ are at best unclear, Petitioner appears to contend that the Fifth Circuit's decision holding that he failed to establish a prima facie claim of discrimination under the ADA warrants review because it (1) is directly at odds with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); (2) creates an intractable split with the decisions of six other courts of appeals; and (3) creates an intra-circuit conflict with the Fifth Circuit's decision in *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2000). Pet., p. 9. Those assertions are uniformly wrong and fail to provide any basis for granting review.

Reeves stands only for the rule that a plaintiff-employee's prima facie case of discrimination, when coupled with evidence providing a reasonable basis to reject the

employer's nondiscriminatory explanation for its decision may be adequate to sustain a finding for intentional discrimination. Here, of course, the Fifth Circuit had no reason to apply *Reeves* because it concluded Plaintiff failed to carry its burden to provide a prima facie case of disability discrimination. The Fifth Circuit's decision does not conflict with *Reeves*.

Nor does the Fifth Circuit's decision conflict with the decisions of the Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. Here, the Fifth Circuit granted Jostens' motion for summary judgment because Petitioner did not produce enough evidence to establish a prima facie case that he was disabled. In the decisions of these other courts, the courts applied the same law and held the plaintiffs to the same burden of proof as the decision below. The fact that the plaintiffs in the other cases carried their burdens while Petitioner did not does not in any way create a circuit split or present an issue warranting review.

Finally, Petitioner's claims based on ERISA do not provide any basis for granting the writ. Tellingly, Petitioner identifies no such basis but instead simply argues the Fifth Circuit reached the wrong conclusion on the merits. That is not a reason that justifies this Court's review. And to the extent Petitioner seeks the writ on any other grounds, those arguments are waived. [3]

---

[3] Petitioner's meandering petition asserts there are no less than 13 questions presented in this appeal. In Questions Nos. 1, 2, 3, 4, 7, and 8, Petitioner appears to seek review of his disability discrimination claim on an the grounds that there he produced evidence showing an alleged record of impairment. The Fifth Circuit determined, however, that Petitioner waived this claim in his appeal because he failed to brief the issue and therefore did not identify any summary judgment evidence that allegedly supported his claim. *See* Pet. App., p. 4a. Likewise, in Questions Nos. 2, 6, and 12, Petitioner seeks review of his contention that Jostens' reasons for terminating him were pretextual and that Jostens

I. THE PETITION IDENTIFIES NO CONFLICT WITH A DECISION OF THIS COURT OR ANY OTHER COURT

The Fifth Circuit granted Jostens' motion for summary judgment because it concluded that Petitioner failed to carry his burden to show a prima facie case of disability discrimination. To establish a prima facie case of disability discrimination, a plaintiff must produce some evidence showing (1) he has a disability; (2) he is qualified for the position in which he seeks employment, and (3) he was discharged because of his disability.

The Fifth Circuit affirmed the district court's dismissal of this case on the grounds that Petitioner failed to establish any evident consistent with prong one, *i.e.*, that he had a "disability." Relevant here, under the ADA, a plaintiff can prove a "disability" if he produces evidence showing he was "regarded as" having "a physical impairment that substantially limits one or more [his] major life activities ...." 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(g)(3). The EEOC Regulations further state that an individual is "regarded as" having such an impairment if the individual (a) has a physical impairment that does not substantially limit major life activities but is treated by his employer as constituting such limitation or (b) has none of the physical impairments defined in 29 C.F.R. § 1630.2(h)(1) but is nevertheless treated by his employer as having a substantially limiting impairment. 29 C.F.R. § 1630.2(*l*)(1), (3). Additionally, the Supreme Court has held that, to establish disability under this definition, a plaintiff must

---

failed to provide him with reasonable accommodations. But the Fifth Circuit never even reached those issues because it determined that Petitioner failed to raise a genuine issue of material fact regarding a prima facie case of disability discrimination under the ADA. Finally, Questions Nos. 5 and 6 are also not properly before this court because Petitioner has never asserted an ERISA retaliation claim.

prove that his employer (a) *mistakenly* believed that he had an impairment that substantially limited one or more major life activities, or (b) *mistakenly* believed that an actual, nonlimiting impairment substantially limited one or more major life activities. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

The Fifth Circuit here concluded that Petitioner failed to carry his burden to establish a prima facie case that Jostens "regarded" him as disabled. That conclusion is neither at odds with this Court's decision in *Reeves* nor departs from—let alone conflicts with—the law applied in the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.

1. Contrary to Petitioner's assertion, the Fifth Circuit's holding does not conflict with this Court's holding in *Reeves*. *See* Pet., pp. 8-11. In *Reeves*, this Court ruled that when a plaintiff proves a prima facie case of discrimination and points to sufficient evidence of pretext (*i.e.*, that the legitimate, nondiscriminatory reason offered by the employer was false), that evidence alone may permit the trier of fact to conclude, without additional independent evidence of discrimination, that intentional discrimination occurred. *Reeves*, 530 U.S. at 147-48. Here, the Fifth Circuit dismissed Petitioner's claim on the grounds that he failed to establish that he was "disabled" under the ADA—a required element of a prima facie case of disability discrimination. *See* Pet. App., pp. 2a-6a. Since the Fifth Circuit concluded that Petitioner failed to raise a genuine issue of material fact regarding a prima facie case of discrimination under the ADA, it never addressed his argument that Jostens' reason for terminating his employment was a pretext for discrimination. *See* Pet. App., p. 10a. The holding of *Reeves* therefore has no bearing on whether Petitioner established a prima facie case of disability discrimination because the Court never proceeded to the burden-shifting stage to which *Reeves* is relevant.

Moreover, in *Reeves*, the Court reiterated the fundamental principle that under the burden-shifting framework a plaintiff must first establish a prima facie case of discrimination. 530 U.S. at 142. *Reeves*, therefore directly supports the Fifth Circuit's conclusion.

2. The Petitioner's argument for a conflict among the circuits fares no better. Petitioner appears to assert that the Fifth Circuit created a conflict by holding that an employer's decision to terminate an employee on the grounds that that employee could not perform any position available at that time with the employer, without more does not prove a prima facie case that the employer "regarded" the employee as disabled. Petitioner claims that the Fifth, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all squarely held that a plaintiff may prove he was "regarded as" disabled by his employer if he adduces evidence showing the employer did not believe he could perform any of that employer's jobs. For two reasons, Petitioner's argument for a conflict is wholly unpersuasive.

First, Petitioner's characterization of the holdings of the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits is simply wrong: in the cases Petitioner cites, those courts applied the *same* test the Fifth Circuit applied here. The courts asked whether an employer "mistakenly believed" (1) that the plaintiff had a physical impairment that substantially limited a major life activity *or* (2) that an actual, nonlimiting impairment substantially limited one of the plaintiff's major life activities. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 188, 192 (3d Cir. 1999) (employer's misperception that employee cannot perform wide range of jobs is sufficient to establish claim of "regarded as" disabled); *Buskirk v. Apollo Metals*, 307 F.3d 160, 167 (3d Cir. 2002) (definition of perceived disability may be satisfied by demonstrating that employer had misperception about existence or severity of impairment); *Henderson v. Ardco*,

Inc., 247 F.3d 645, 650 (6th Cir. 2001) (under ADA, employee may be regarded as disabled if employer mistakenly believes that he has substantially limiting physical impairment or mistakenly believes that actual, nonlimiting impairment substantially limits major life activity); *Riemer v. Ill. Dep't of Transp.*, 148 F.3d 800, 806 (7th Cir. 1998) (individual with impairment that does not substantially limit major life activity may meet test for "regarded as" disability by showing that employer nevertheless treated him as having substantially limiting impairment); *Ollie v. Titan Tire Corp.*, 336 F.3d 680, 685 (8th Cir. 2003) (employee may show perceived disability based on employer's mistaken belief that he had impairment that substantially limited major life activity or that employee's actual, nonlimiting impairment substantially limited major life activity); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir. 2001) (employee may fall within perceived disability provision of ADA if employer mistakenly believed that employee had impairment that substantially limited major life activity or mistakenly believed that actual, nonlimiting impairment substantially limited major life activity); *McKenzie v. Dovala*, 242 F.3d 967, 971 (10th Cir. 2001) (analyzing claim that employer discriminated against plaintiff based on a "mistaken perception" of impairment). Nothing, then, about the law those courts applied conflicts with the identical test the Fifth Circuit applied here. *See* Pet. App., pp. 4a-5a.

Second, Petitioner likewise errs by asserting the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits impose a lower burden of proof on plaintiffs to prove a prima facie case of discrimination based on disability. To be sure, those cases do not hold *as a matter of law* that a plaintiff can carry its burden to prove a prima facie case of disability under the "regarded as" prong merely by proving the employer believed the plaintiff could not do any other job it offered.

Indeed, that is not the law. *See Sutton*, 527 U.S. 489 (noting plaintiff must show the employer was *mistaken* in believing he was substantially limited in performing a major life activity). Instead, those courts applied the same legal test to different factual circumstances and concluded that, unlike here, the plaintiff failed to carry its burden to assert a prima facie case that he was "regarded as" disabled by his employer. That those courts reached different conclusions simply based on different facts, and not the application of conflicting law, demonstrates that review is unnecessary.

That fact is made all the more clear when one examines each of Petitioner's cited cases: in *all* of those cases there was some evidence, consistent with the doctrinal test to show an employee was "regarded as" disabled that the employer "mistakenly believed" that the employee was impaired.

a. *Third Circuit.* In the Third Circuit's decision in *Taylor*, for example, the court reversed a grant of summary judgment to the defendant-employer where there was evidence that the employer misinterpreted the employee's medical records and erroneously concluded that the employee was subject to more severe work restrictions than the limitations actually imposed by the employee's treating doctor. *See Taylor*, 177 F.3d at 183-84. Although the plaintiff's physician marked on a physical capacity evaluation form completed at the employer's request that the employee's work restrictions due to his ankle injury were temporary, the employer stated in a termination notice that the employee was under permanent restrictions on his abilities to stand, walk, and lift, which was not true. *Id.* Based on the employer's misperceptions about the scope of the employee's abilities, the Third Circuit concluded that the employee was "regarded as" disabled. *Id.* at 184.

The Third Circuit's decision in *Buskirk* is even more off base. There, on the employee's appeal of the district court's

decision to grant the employer's post-trial motion for judgment as a matter of law, the employer did not dispute that it regarded the employee as disabled under the ADA, but instead argued over "its obligations to [provide reasonable accommodations] a 'regarded as' employee." *Buskirk*, 307 F.3d at 167-68. In passing, the Court briefly discussed its conclusion that the plaintiff presented sufficient evidence at trial to establish that his employer had regarded him as disabled, noting that after the employee had worked successfully on a reduced work schedule for more than a year under a light duty release, the employer nonetheless placed the employee on leave because he could not perform his regular job and the company determined that it did not have any vacant permanent positions that met the employee's physical capabilities. *Id.* When the doctor later removed some of the employee's restrictions and released him to full-time hours, the employer refused to put the employee back to work. *Id.* at 164. Despite the release, the company concluded that the employee remained unable to perform any of its jobs and informed the employee in a letter that although his condition had improved, the employer had reservations about his ability to perform the positions. *Id.* at 164, 170.

b. *Sixth Circuit.* The Sixth Circuit's decision in *Henderson* was premised on these same concerns holding that the plaintiff carried its burden under the "regarded as" prong where it produced substantial evidence showing the employer "mistakenly believed" he was disabled. Among the evidence the court relied on as proof that the plaintiff carried his burden was (1) a doctor's release stating that the employee was physically able to resume working with certain limitations (which the employer ignored), 247 F.3d at 647-48; (2) the employer's refusal to allow an employee to return to work despite the fact the employee had been medically cleared for restricted duty, *id.* at 647; and (3) the employer's decision to reject the plaintiff's request for a

light duty assignment even though the plant had openings that complied with the work restrictions set by the employee's doctor, *id.* at 648. Because this evidence showed the employer reached its conclusion about the employee's ability to work independent of the medical information and treated the employee as more impaired than her physician indicated that she was, the court concluded the plaintiff satisfied her burden.

c. *Seventh Circuit.* In *Riemer*, the Seventh Circuit considered whether the district court erred by refusing to grant the defendant-employer's post-trial motion for judgment as a matter of law where a jury found that an employee was "regarded as" disabled. Significantly, on appeal the employer in *Riemer* did not dispute that it "perceived Mr. Riemer's asthmatic condition as a limitation on his major life activity of breathing." 148 F.3d at 806. The case therefore turned on whether the employer ignored the results of the employee's evaluation by his treating doctor, formulated its own belief regarding the effects of the employee's condition which was inconsistent with the physician's opinion, and restricted the employee in a manner that the doctor did not deem necessary. *Id.* at 802-03. The employee's doctor notified the defendant that the employee, who had taken a brief leave of absence when exposure to fumes in the defendant's iron fabrication shop exacerbated his asthma, was medically fit to return to full duty without limitations and that his asthmatic condition was totally controlled. *Id.* at 802. Although the doctor twice assured the employer that it was safe for the employee to work in the fabricating department, the employer nevertheless concluded that the employee's asthma prevented him from working in the shop and therefore reassigned him to an outside field position. *Id.* at 802-03, 806-07. The court therefore concluded that the evidence of the employer's persistent pattern of ignorance provided a reasonable basis

for the jury to conclude the employee was "regarded as" disabled.

d. *Eighth Circuit.* Just like *Riemer*, the issue in the Eighth Circuit's decision in *Ollie* was whether the district court correctly refused to grant an employer's post-trial motion for judgment as a matter of law. The doctor conducted a pre-employment examination of the plaintiff and stated in his report that the plaintiff was medically able to carry out the essential functions of a tire building job but noted that due to his history of asthma the plaintiff might experience difficulty in areas with dust or fumes. 336 F.3d at 683, 686. The company misconstrued the results of the plaintiff's physical to mean that he could not work near any dust or fumes. *Id.* at 683-84, 686. Based on its misinterpretation, the defendant refused to hire the plaintiff and informed him that there were no jobs available for him since the doctor had instructed the company that the plaintiff could not be exposed to dust or fumes. *Id.* at 684. And just like in *Riemer*, the Eighth Circuit held that this evidence that the employer incorrectly interpreted medical advice furnished by its company doctor provided a reasonable basis for the jury to conclude the employee was "regarded as" disabled. *Id.* at 683-84.

e. *Ninth Circuit.* In the Ninth Circuit's opinion in *Johnson*, the Court reversed the district court's decision granting defendant judgment as a matter of law where plaintiff produced evidence that the employer rejected a work release in which the employee's doctor stated that she had recovered sufficiently from a leg injury and was physically able to resume working with specified limitations. *See* 251 F.3d at 1223-24. Although the employee had been medically approved for restricted duty, the employer refused to permit her to return to work based on its personnel policy that required an unlimited work authorization. *Id.* at 1224. The employee obtained an

unrestricted work release soon after she resigned. *Id.* Despite the employee's complete medical clearance, the defendant still refused to hire her for any of the numerous job vacancies in the fields in which the employee had previously worked for the employer. *Id.*

f. *Tenth Circuit.* Finally, in *McKenzie*, the Tenth Circuit reversed a grant of summary judgment to an employer, finding clear evidence that the employer's decision to terminate the plaintiff was based on an unsubstantiated belief that she was disabled. There, shortly after the plaintiff resigned from her position as a deputy sheriff, her doctor notified her employer that she could return to work because her mental condition had improved. 242 F.3d at 968. Although the doctor had determined that the plaintiff was well and capable of fulfilling her duties, the employer decided nonetheless that the plaintiff should not work in the law enforcement field and refused to consider her for any available positions. *Id.* On this basis, the court concluded the employer treated the plaintiff as though she still suffered to the same extent from psychological illnesses that had caused her to previously stop working and therefore she was "regarded as" disabled, despite the lack of any such impairment. *Id.* at 968-69, 970-71.

3. In stark contrast to the evidence plaintiffs produced in these cases, Petitioner falls remarkably short of carrying his burden to show a prima facie case that he was "regarded as" disabled by Jostens. Unlike the employers in the cases discussed above, Jostens did not "mistakenly believe" that Petitioner had a substantially limiting right arm impairment. The undisputed summary judgment evidence established that Jostens assigned Petitioner to the Layout Clerk position in order to comply with Dr. Finnegan's work restrictions, which specifically limited Petitioner to restricted duty performing the Layout Clerk job for four hours a day. R. 705: 120-21, 189. *By his own admission,*

when Petitioner was terminated from employment, he (1) was unable to perform Layout duties, and (2) had not been released by Dr. Finnegan to return to his regular position as a Diamond Setter, perform any other available position at Jostens, or work as a Trainer. R. 705: 189, 227 Furthermore, there were no other jobs available at that time at Jostens that fit the restrictions imposed by Dr. Finnegan. R. 705: 112, 171, 202. Unlike the employers in the cases in which the other Circuits concluded that evidence supported claims of perceived disability, the unrebutted evidence shows Jostens did not misinterpret or disregard Dr. Finnegan's medical opinion; it instead treated Petitioner consistent with the medical information provided by Dr. Finnegan. Accordingly, Jostens' treatment of Hinojosa does not satisfy the *Sutton* requirements for "regarded as" disability.

4. Although these facts provide a more than sufficient reason to conclude there is no circuit split, Petitioner's cases are also easily distinguished on the facts because, in the four cases where it was even an issue, the plaintiff produced specific evidence showing the employer considered regarded him as substantially limited *in a major life activity*. On this basis, those courts concluded that plaintiff could have performed a wide range of jobs that the employer refused to offer.

Thus, in *Taylor*, for instance, the Third Circuit reversed the motion for judgment granted for the employer because the evidence admitted at trial was sufficient for submission of the employee's perceived disability claim to the jury for determination. *Taylor*, 177 F.3d at 182-83. The Court based its conclusion on the fact that the employer appeared to have considered the employee to be incapable of performing a wide class of jobs, *id.* at 183, 188, 196—a fact that was made all the more clear by the employee's termination notice which stated the employee could no longer do his

regular job or any other available position because of restrictions on his abilities *to stand, walk, lift, carry, reach, push, pull, bend, squat, climb, crawl, and use leg controls.* *Id.* at 184, 188. Because the employer clearly and explicitly stated the employee could not perform a panoply of major life activities, the Court had no trouble determining that the employer regarded the employee as disabled. *Id.* at 188.

Similarly, in holding that the employee in *Henderson* produced sufficient evidence to create a genuine issue of material fact precluding summary judgment on her perceived disability claim, the Sixth Circuit Court pointed out that the employee presented specific evidence regarding the size and nature of the class of jobs that her employer concluded that she was not capable of doing, job descriptions which demonstrated that the company had open positions that fit the employee's work restrictions, and some evidence that manufacturing represented a significant portion of the jobs locally available to the plaintiff. 247 F.3d at 648, 653 & n.5. Additionally, the employee produced evidence which indicated that the defendant's manager believed that a person with physical restrictions was unable to perform factory work even if the duties did not exceed the worker's restrictions. *Id.* at 651.

Likewise, in concluding that sufficient evidence supported the jury's verdict that the plaintiff was perceived as disabled under the ADA in *Ollie*, the Eighth Circuit reasoned that the plaintiff produced evidence at trial which showed that the company to whom he applied for employment regarded him as unable to perform a class of jobs. 336 F.3d at 687. The evidence included admissions made by the defendant's human resource staff that they had determined contrary to the medical evidence that the plaintiff's asthma prevented him from working in any position that involved contact with dust or fumes and that they also believed that all warehouse and manufacturing

jobs included working around dust and fumes. *Id.* Their testimony established that the employer regarded the plaintiff as significantly restricted in his ability to perform a class of jobs consisting of manufacturing or warehouse positions throughout the plaintiff's town. *See id.* at 686-87.

Finally, in *McKenzie*, the Tenth Circuit determined that summary judgment for the employer was precluded on the plaintiff's "regarded as" disabled claim because she raised a genuine issue of material fact about whether the defendant perceived her as substantially limited in her ability to work in all law enforcement positions. *McKenzie*, 242 F.3d at 971-72. The summary judgment proof included deposition testimony in which defendant's personnel admitted that they believed that due to the employee's past psychological illnesses it was not in her best interest to regain a law enforcement job, that she would be better off in a different field of work, and that the employee should not be a law enforcement officer. *Id.* at 968, 970-72. The Tenth Circuit also explained that the employer attempted to have the plaintiff's certification as a peace officer revoked to prevent her from serving in a variety of law enforcement related posts. *Id.* at 968-69, 970.[4]

---

[4] In Petitioner's remaining cases the courts did not even analyze whether there was sufficient evidence showing the employers perceived the employees as substantially limited in a major life activity. *See Riemer*, 148 F.3d at 807 (noting plaintiff did not allege that he was perceived as disabled in working and therefore not addressing whether the employee demonstrated that his employer regarded him as precluded from a class of jobs or a broad range of jobs); *Johnson*, 251 F.3d at 1226 n.3, 1228 (determining that the defendant failed to preserve for appeal the issue of whether the plaintiff established that the defendant perceived her as substantially restricted in the ability to perform a class of jobs or a broad range of jobs); *see also Buskirk*, 307 F.3d at 168-70 (noting that a plaintiff is required to show that his employer mistakenly perceived him as unable to work in a wide range or broad class of jobs, but not detailing the evidence that was admitted at trial which satisfied this requirement).

Here, unlike the plaintiffs in the cases discussed above, Petitioner presented *no evidence* demonstrating that Jostens regarded him as significantly restricted by his right arm impairment in his ability to perform an entire class of jobs, a broad range of jobs or to engage in any other major life activity. In particular, Petitioner produced no summary judgment proof showing that Jostens perceived him to be substantially limited in a non-work major life activity compared to the average person in the general population and/or establishing the number and types of jobs in the Denton, Texas area which Jostens allegedly believed that Hinojosa was unable to perform. *See* 29 C.F.R. § 1630.2(j)(1)(ii), (3)(i), (ii)(A)-(C). Furthermore, the Human Resource Assistant who located the light duty position for Hinojosa testified that she did not regard Hinojosa as disabled. R. 705: 120-21.

Because the decisions of these other Circuits turned on case-specific facts different from the circumstances presented in Hinojosa's perceived disability claim, it cannot be concluded that the other Circuits would have decided Hinojosa's case differently from the Fifth Circuit. There is no circuit split warranting review.

5. Last, Petitioner wrongly asserts that the Fifth Circuit's decision here creates an intra-circuit split with the Fifth Circuit's decision in *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2001), and that this intra-circuit split requires this Court's review. Putting aside the fact the Court's decision below does not depart from *McInnis*—both cases applied the same test for determining whether an employee was "regarded as" disabled which this Court set forth in *Sutton*—it is well-settled that an intra-circuit provides no basis for this Court's review.

II. PETITIONER'S CLAIMS FOR DISCRIMINATORY DISCHARGE AND BREACH OF FIDUCIARY DUTY UNDER ERISA DO NOT WARRANT THIS COURT'S REVIEW

The Court should deny the Petition for review of Hinojosa's discriminatory discharge claim under Section 1140 of ERISA and his breach of fiduciary duty claim under Sections 1109 and/or 1132 of the statute because Hinojosa failed to articulate any reason upon which review may be based. *See* Pet., pp. iv, 26-29.

Hinojosa does not allege that the Fifth Circuit's decision affirming summary judgment for Jostens on his ERISA claims conflicts with the decision of another Circuit. He also does not contend in his Petition that the Fifth Circuit decided an important federal question in a manner that conflicts with a decision of this Court or the Texas Supreme Court, departed from the accepted and usual course of judicial proceedings, and/or decided an important question of federal law that should be settled by this Court. *See* Pet., pp. iv, 26-29; Sup. Ct. R. 10(a), (c). Accordingly, Hinojosa's Petition for review of his ERISA claims should be denied.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

William O. Ashcraft, Esq.
Counsel of Record
S. Lynn Blakeman, Esq.
ASHCRAFT LAW FIRM
3900 Republic Center
325 North St. Paul Street
Dallas, Texas 75201
Telephone: (214) 987-0660